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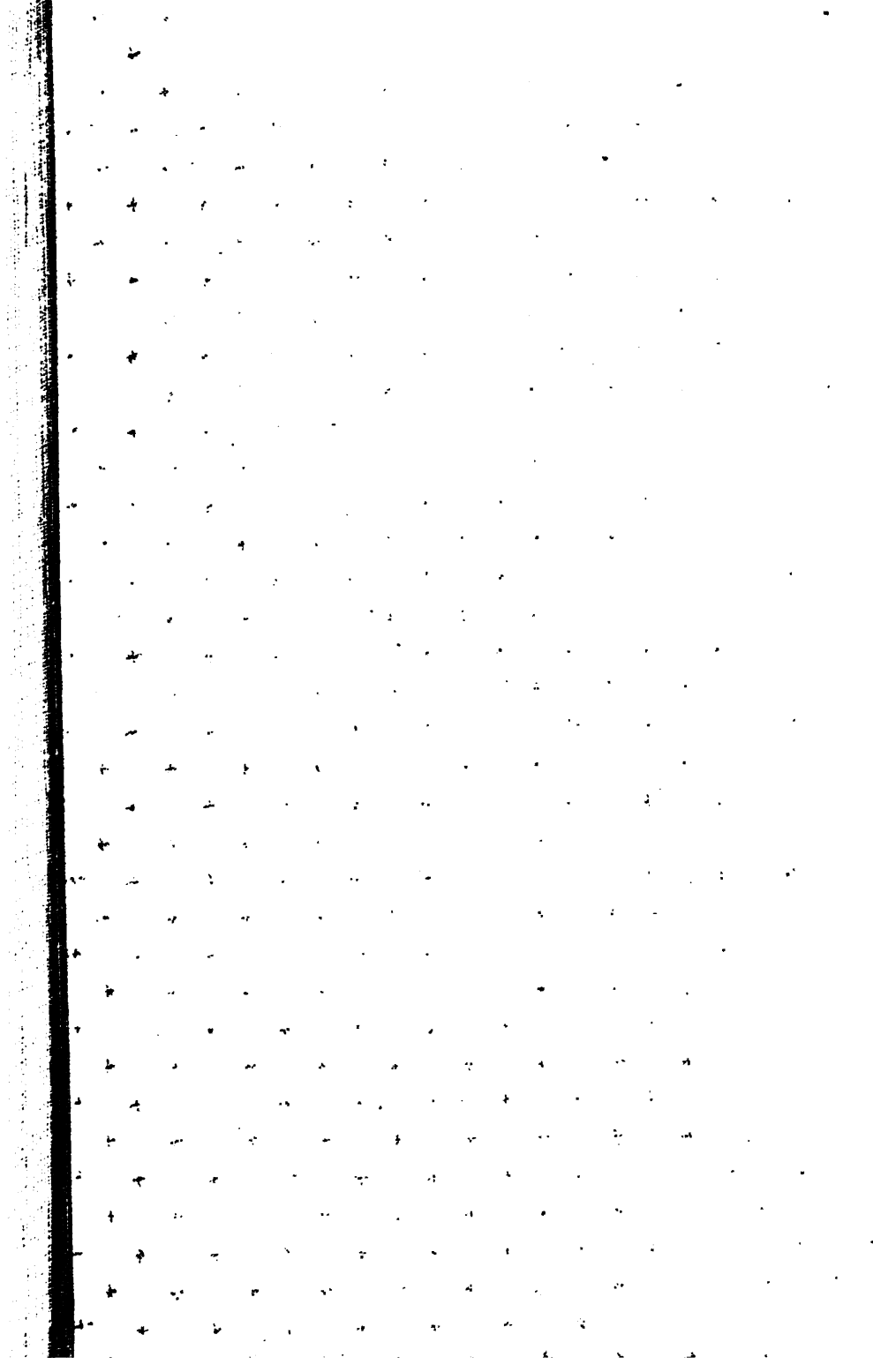
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THE
LAW AND CUSTOM

OF THE
CONSTITUTION

PART II
THE CROWN

BY
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PREFACE TO THE FIRST EDITION

I REGRET that the second part of my work on the Constitution should have been so long in following its predecessor, and that it should not be better worth waiting for. For the delay I am not wholly in fault; for the shortcomings I can only plead a capacity unequal to the task which I undertook with a light heart, which I have pursued with interest and pleasure, and now conclude with misgiving.

I have tried to show how the executive government of this Empire is conducted—to draw a picture of the executive as distinct from the legislature,—of the Crown in Council as distinct from the Crown in Parliament.

Of the difficulties which I have experienced, two stand out prominently before me.

I think that any one will find it difficult to describe faithfully the daily working of a business with which he is not practically conversant. I have found it so in the course of my endeavour to describe the working of the departments of government. In spite of the kindest and most generous help from many friends who have the details at their command, I fear that I have not done justice to their efforts on my behalf.

But my greatest difficulty has been to arrange my subject. I wished to show how the business of government is carried on; who settles what is to be done; who acts; on what authority; and in what manner. In order to do this, and to do it within reasonable compass, I have omitted two matters, which I have found to occupy a place in other treatises. The royal prerogatives set forth at length

by Blackstone are either attributes ascribed to royalty by lawyers, or are powers exercised through departments of government. As such I have dealt with them, and my chapter on the prerogative will be found to contain, apart from history, only an account of what the Crown actually does, at the present day, in the choice of ministers, the settlement of policy, and the business of administration.

Another matter with which I have not specially dealt is the conflict which has from time to time arisen between the rights of the subject and the assertion of rights by the executive officer. It does but illustrate the working of that 'rule of law' which, as Mr. Dicey has impressed upon his readers, is a marked feature in our constitution. I have noted the exceptional position of persons subject to ecclesiastical or military law, and I have noted also the circumstances under which the Crown and its servants enjoy any special privileges or immunities in the administration of justice; but having once stated the principle that the King's command cannot excuse a wrongful act, and the fact that the Crown has no longer the power to control the action of the Courts, I have not made these matters the subject of any special treatment or illustration. I could but have said over again, what Mr. Dicey has set forth once for all, that in the relations of the Crown and its servants to the subjects of the Queen the rules of Common Law prevail.

Omitting these topics, which I conceived to be either useless or irrelevant to my purpose, I had still to arrange, in their proper places, the parts which the Crown plays in the work of government; the composition and action of the Cabinet—the determining power in the constitution; the departments of government which carry out the policy accepted by the Crown, on the advice of the Cabinet; and the working of these departments over the vast area of the Queen's dominions; finally I had to state the relations in which the Crown stands to the Churches, and to the Law Courts of the United Kingdom and the Empire.

Of the arrangement which I have adopted, I will only say that it represents an anxious effort to supply the student with the information which he requires, and to supply it in the place and order in which he might reasonably expect to find it.

As to the information itself, I have had to collect it from many sources. Of books dealing with the subject in its entirety, I have found the fullest and the most serviceable to be the work of Mr. Alpheus Todd 'on Parliamentary Government in England,' but for the most part I have had to go to special treatises, to Parliamentary papers, or, directly, to the various government offices. For the kindness of members of many of the departments of government, I find it hard to express my gratitude in terms satisfactory to myself. If I do not make more than this general acknowledgement now, it is because I am unwilling to associate their respected names with a work which may perhaps prove to be a failure. If my book should meet with such approval as to need another edition, it will be my pleasure as well as my duty to thank them individually.

It may be thought that the historical matter which I have found it necessary to introduce, occupies too large a space. I can only say that I found it impossible to explain the present, without such reference to the past. Nor can I regret that this should be so. For when we contemplate our institutions in their monumental dignity, and the world-wide span of our Empire, it is well to remember the patience and courage of our forefathers, and the long line of kings and queens and statesmen, often conspicuously great in force of purpose and vigour of intellect, to whom we owe what we now possess. It would be a mean thing, even if it were possible, to take stock of our inheritance without asking how we came by it. But it is not possible. If it is difficult to dissociate law from history in any branch of legal study, least of all can this be done in describing the fabric and machinery of an ancient state. I will not

therefore apologize either to lawyers or to historians for trespassing on the domain of history; I will only express a regret that I have not trespassed with greater knowledge and a surer foot.

WILLIAM R. ANSON.

ALL SOULS COLLEGE,
January, 1892.

PREFACE TO THE SECOND EDITION

IN preparing this book for a second edition, I have made some changes of arrangement, for the sake of clearness and convenience, and some changes of substance. Local Government has needed a different treatment; I have been able to write more fully on the constitution of the Island of Jersey, and on the relations of Star Chamber and Privy Council. In other respects I have tried to bring the book up to date.

I must again tender my thanks to those who have assisted me in the preparation of the first as well as the second edition of my book—to Sir Arthur Godley, who helped me to a knowledge of the organization of the India Office; to Mr. John Bramston, who revised my chapter on the constitutions of the colonies; to Mr. A. G. C. Liddell, who has given me information which is procurable at the Crown Office, and which is not to be found in books; and especially to the Comptroller and Auditor-General, Sir Charles Ryan, who, in 1891, most kindly read and corrected the pages relating to the issue of public money and the audit of public accounts, and who saved me thereby from the mistakes into which the amateur, however anxious and careful he may be, is almost certain to fall when dealing with the details of departmental business.

WILLIAM R. ANSON.

ALL SOULS COLLEGE,
February, 1896.

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INTRODUCTION.

It may assist the reader if I describe in a few introductory words the general plan of this book, and the connection of its chapters one with another. Summary of

In treating of the executive of this country we must always bear in mind that the Crown, acting directly or remotely through ministers and officials, is the executive. In my first chapter therefore I have tried to trace historically, and to describe as a matter of present practice, the part taken by the Crown in the choice of ministers, the settlement of policy, the detail of administration. First Chapter.

Having thus endeavoured to show how the Crown acts in the working of government, I proceed in the second chapter to consider the title by which the Crown has been and is held : who are its subjects and what the mutual duties of sovereign and subject as such ; what provision has been made from time to time for incapacity, from one cause or another, on the part of the King to discharge the duties of royalty. Second Chapter.

In the third chapter I pass from the Crown itself to consider the history and character of the body which has advised and does advise the Crown, and thus determines the policy of government. The Privy Council, the Cabinet, the Prime Minister, their relations to the Crown, to one another and to Parliament, form the subject of this chapter. Third Chapter.

Having thus dealt with the body *by whose advice* the Crown acts, I proceed in the fourth chapter to deal with the departments of government *through which* the Crown acts. In doing this I have distinguished the political and changing from the non-political and permanent members of these departments, Fourth Chapter.

pointing out that Ministers are responsible for every act of the executive.

Fifth Chapter. In the fifth chapter I have to consider the action of these departments over the whole vast area of the Queen's dominions. Beginning with the United Kingdom I have worked outward to the protectorates and spheres of influence which fringe our Indian and African borders. If the arrangement of this chapter is open to criticism, it may yet serve, I hope, to set before the reader the common centre and the unity of the Empire.

Sixth Chapter. In the sixth chapter I deal with the Foreign Office, with the mode in which relations are maintained with other states, and with the prerogative of the Crown in making war, peace and treaties.

Seventh Chapter. The seventh chapter shows how government and its appliances are paid for, dealing with the revenue, its sources, the mode in which it is collected, kept, issued, and accounted for to Parliament.

Eighth Chapter. The eighth chapter treats of the securities for our safety at home and abroad, the army and the navy; and of the two departments which administer the Queen's prerogative in respect of them, the War Office and the Admiralty.

Ninth Chapter. The ninth chapter describes the relations of the Crown to certain ecclesiastical bodies, the Established Churches in England, Scotland, India and the Colonies.

Tenth Chapter. The tenth chapter treats of the Courts. I have here endeavoured to sketch the jurisdiction fused in the Supreme Court, the main divisions of that Court, the jurisdictions inferior to it, the jurisdictions which whether inferior or not are outside it. Then I have drawn all together in the two great Courts of Final Appeal, and then I have pointed out the position occupied by the Crown and its servants before the Courts.



CHAPTER I.

THE PREROGATIVE OF THE CROWN.

SECTION I.

THE NATURE OF PREROGATIVE.

WHERE we find a body of men united for the maintenance of independence against external force, and for the security of certain common interests, we may say that this is a political society. We may frame what ideal we please for such a society. We may assume that it exists in order to protect its members from invasion or anarchy, from violence external or internal: or we may consider the object of such a society to be not only that each man may live secure, but that each may live the best life of which he is capable. But in any event, and in every political society, there must be some person or body to represent the State in its dealings with other States, to call forth and command the available force of the society, when needed, for defence and for attack.

Again, in every such community rules of conduct must be made, and sometimes changed, with a view to internal security and order; and the observance of these rules must be enforced. If the fact of observance or breach should be called in question some recognized authority must exist for the purpose of answering the question, and here again the decisions of such an authority must be enforced. Thus we find that there are three sorts of machinery necessary to a political society:

a legislature to make law, a judicature to interpret law, an executive to wield the force of the community for the maintenance of order within and security without.

The forces which work this machinery are found to be differently disposed in different communities and at different times. They may be centralized in one person or dispersed among many. To compare one polity with another, or to consider how constitutional forces may best be disposed, and to what end, is the business of the political student; I have here to deal only with the structure and working of our own constitution.

Legisla-
tive Sove-
reignty.

The law-making power in this country is the Crown in Parliament; Parliament, convened by the Crown and making laws with the royal assent, can alone change the constitution of the State and give or take away legal or political rights. The interpretation of law is the work of the Crown in its Courts, done through judges who have been and are the councillors and representatives of the Crown. The enforcement of law within the community, the maintenance of its safety and dignity as regards external relations, is also the duty of the Crown. The Ministers of the Queen, individually as heads of departments, or collectively in the Cabinet or Privy Council, conduct the executive business of the country. My object is to describe the construction and practical working of these various departments or institutions, and to show how they are connected with the central executive force. But that force itself, the Crown, whence justice and administration alike proceed, stands at the threshold of our inquiry.

The
Crown in
Council
in the
Executive.

The Pre-
rogative.

Some part of the powers exercised by the Crown are conferred or defined by Statute, but a part also exists in virtue of custom or Common Law. The term Prerogative may be applied to the whole of these, but it should properly be limited to the ancient customary powers of the Crown. I will deal at once with the meaning of a term which has caused some difficulty in the past.

Blackstone defines prerogative as 'a special pre-eminence

which the king hath, over and above all other persons, and out of the ordinary course of the common-law in right of his royal dignity.'

Mr. Dicey defines prerogative more precisely as 'the discretionary authority of the executive,' and he explains this to mean everything which the Queen or her servants can do without the authority of an Act of Parliament. Suggested definitions.

Blackstone's definition of prerogative is obviously too vague to be of practical value. The powers of the Crown in its executive character are twofold, consisting in those which it possesses at Common Law and those which are conferred on it by statute. The statutory powers cannot fairly be placed under the head of Prerogative; they are not inherent in the Crown, but are conferred upon it by the Legislature. The Common Law powers are not, as Blackstone says, 'out of the ordinary course of the Common Law'; they are a part of the Common Law, and as capable of ascertainment and definition by the courts as any other part of the unwritten law of the land. It is these Common Law powers which make up what Mr. Dicey calls 'the discretionary authority of the executive.' But, besides these, there are certain attributes of the Crown from which legal results necessarily flow, and certain incidental rights, not perhaps of the first importance, yet proper to be treated of in a book on constitutional law. The common law powers of the executive do not exhaust the meaning of this complex and difficult term, and one may with truth ascribe the various rights, privileges, and attributes which make up the Prerogative to three sources. Sources of Prerogative.

First, there is the residue of that executive power which the king in the early stages of our history possessed in all the departments of government; when he led his people in war, administered their affairs in peace, was their judge in the last resort. This power, reduced in compass and limited in exercise by many conventional and practical restrictions, remains as that discretionary authority of the executive spoken of by Mr. Dicey. The tribal chief-taincy.

Secondly, there are parts of the prerogative which trace

The feudal
lordship.

their origin from the position of the king as the feudal chief of the country, as the ultimate landowner and the lord of every man. Hence arise those rights of the Crown which are in relation to the kingdom what a seignory is in relation to a manor, the right to escheat, to treasure trove, to the custody of idiots and lunatics, matters which, properly arranged, would fall, some under the head of revenue, some under that of jurisdiction. Hence too comes the early conception of Treason as a breach of the feudal tie which binds the man to his lord. We now regard Treason as an offence not against the person of the King but against the constitution of the State which he represents; and Allegiance, as a test of nationality rather than an assurance of loyalty to an individual; but these ideas begin in feudal times, and spring from the feudal relation in which the subject stood to the sovereign.

The king-
ship of
legal
theory.

Thirdly, there are attributes with which the Crown has been invested by legal theory. These attributes take their origin in rules of practical convenience, and in their turn give rise to legal deductions which are sometimes of an unexpected character. Such is the attribute of *perpetuity*. It was important that one king should succeed to another with the shortest possible interregnum; that the king's peace should not be in abeyance for however short a time. As hereditary right came to be more strictly regarded, the process of election which intervened between the death of one king and the completed title of another, grew less and less important. At length Edward IV was held to have begun his reign so soon as his title by descent was proved, and thenceforward perpetuity is regarded as a royal attribute; the king, it is said, never dies; the throne is never vacant, and a legal theory, which sprang from practical convenience, became, when James II fled the country, an obstacle to the convenient solution of a practical difficulty.

The king
never dies.

The king
can do no
wrong:

Such too is the attribute of *perfection of judgement*. 'The king,' says Blackstone, 'is not only incapable of *doing* wrong, but even of thinking wrong; he can never mean to do an

improper thing ; in him is no folly or weakness.' Hence the king's ministers are held to be responsible for the acts of the king. There was much practical convenience in this theory of ministerial responsibility : misgovernment is more easily visited upon the officer who advises than upon the king who acts, or authorizes action, upon his advice. The servant can suffer without any such convulsion of the body politic as would ensue if the master were held liable. The doctrine took its rise at the time that Henry III reigned while yet a child, and it has been worked out on its political side in such a manner as to contribute alike to the stability of the throne and the popular character of our government. But the maxim in which it is expressed, 'the king can do no wrong,' has lent itself to some deductions which not only limit the freedom of royal action, but also affect rules of private law. There are things which the king may not do in person because if he were in the wrong the party aggrieved would have no remedy¹. And there are injuries for which the subject can obtain no redress from the Crown, or, what is the same thing, from a department of government, because a master is only liable for the acts of his servants on the principle that their wrong-doing is his wrong-doing ; so if the master 'can do no wrong,' he cannot be made liable for the wrongful acts of the persons in his employment².

Of these three kinds of prerogative the most ancient and the most important are the customary rights, legislative and executive, which the Crown possesses, and for the purposes of this treatise the executive concern us most. I have spoken elsewhere of the powers of the Crown in Parliament ; the feudal rights of the Crown are mere incidents of the prerogative ; they add, here and there, features which can only be explained when we conceive of the king as being in relation to the kingdom what the lord was to the manor. The artificial rules deduced by lawyers from attributes ascribed

¹ Coke, Inst. ii. p. 186.

² See chap. x. Sect. vi. § 2.

to the sovereign have doubtless important effects traceable in the working and conventions of the constitution: but it is in the power of the Crown to *act* on behalf of the State in all departments of government that we find the rules relating to the executive with which I am mainly concerned.

To tell the process by which powers so wide in theory, so limited in practice, have come into existence, have grown and have narrowed, would be to write the history of the monarchy in this country. This, even if I were capable of doing it, I would not do here: yet it may be useful to mark in outline the periods of growth and limitation of the royal power, because the present law and custom upon the subject have been slowly defined, and their definition must be illustrated by precedents which it is not easy to understand without some general knowledge of our history.

SECTION II.

THE KING BEFORE PARLIAMENTS.

§ 1. *The Saxon king.*

The Saxon
kingship

representa-
tive,

The Saxon king was a representative chief. To the members of his community he was the embodiment of its dignity and its history. For this purpose the kingly office was endowed with special sources of revenue from the land of the community and was adorned with the insignia of royalty, the throne, the crown, the sceptre, standard and lance. The king represented the order and the justice of the community since he was bound to preserve its peace and, in the last resort, to declare its customs upon appeal. He represented the force of the community in its dealings with other kingdoms, in the conduct of war, in the making of peace and of treaties. The sheriffs, the bishops, the ealdormen, that is to say the great local officers, secular and spiritual, were his officers. In conjunction with the Witan he made laws and imposed taxes, but the laws were his laws,

and he appropriated to such purposes as he thought fit the money raised by taxation. responsible.

The Saxon king had therefore a position of great dignity and a wide discretionary power: but in the exercise of this discretion he was constantly checked by the necessity of acting with and through the Witan, and was ultimately controlled by his responsibility to the community whose collective wisdom the Witan was supposed to represent. For it has been a marked and important feature in our constitutional history that the king has never, in theory, acted in matters of state without the counsel and consent of a body of advisers¹, varying in constitution from time to time, but retaining always something of a representative character. The Witan in action.

The Witan may be said to have represented the wisdom of the community only by a figure of speech, consisting as it did of officials, ealdormen and bishops, king's thegns and nominees of the king; but in its relation to the king its powers were great. It took part with him in legislation and taxation, in the deliberations which determined the policy of the country, in the appellate jurisdiction which he exercised in the last resort, in the grant of public land, in the appointment of ealdormen and bishops. And further, though royalty was in theory confined to one family, the Witan in the assembly of the nation made choice of the most fitting member of that family to be king. The king went through the formal process of election, his responsibilities were formulated in the coronation oath² and were enforced by the possibility of his deposition. in legislation.

The Saxon king, then, though his dignity was great and his discretionary power wide, was not a hereditary monarch, as we understand the term hereditary, was not supreme land-owner, was not irresponsible for acts done by his command.

¹ Stubbs, Const. Hist. i. 127, 194, 276, 370. (§§ 53, 76, 98, 125.)

² Ibid. i. 146. (§ 61.) Documents, p. 62.

§ 2. *The Norman king, his ministers and Council.*

The Norman king

a conqueror,

The position of the Norman king was very different from that of the Saxon, and this was partly the necessary result of a position acquired by conquest, partly the consequence of feudal ideas derived from the continent¹. Anxious as William I undoubtedly was to avoid the appearance of an adventurer and to figure as the rightful heir to the inheritance of Edward the Confessor, his title was established and upheld by force and arms. When resistance was overcome, the institutions of the land were at his mercy, and he used them as seemed to him most prudent for the security of his throne.

a feudal lord.

Feudalism, which was based on the holding of land subject to certain obligations of fealty and service, at once made the king the supreme landowner and invested the relation of king and subject with a contractual character. This new position of the king in relation to land had various effects. In respect of the great landowners who held of the king it established a personal tie between him and them which tended to strengthen his hold upon their fidelity and services; in respect of the royal revenue it made the king the immediate owner of all the unappropriated land of the community and the inheritor of every tenant-in-chief who died without heirs or forfeited his land for misconduct²; in respect of title to the Crown the close association of the rights of the Crown with the ownership of land tended to assimilate the descent of the Crown to the descent of an estate in land, and thus inevitably increased the hereditary at the expense of the elective character of kingship.

Features of English feudalism.

But William was not content that the feudal relation should exist only between himself and the tenants-in-chief. He established the rule that every man, of whomsoever he

¹ To this one may add that the Norman Duke was practically absolute, though he acted in the presence of a Council of barons chosen by himself.

² 'Ultimi heredes aliquorum sunt eorum domini.' Glanvill. vii. 17.

might hold his land, should reserve his fealty¹ to the king, and should owe to the king whatever military service was due upon his fief. Thus was created a more precise relation between king and subject than had existed when the king was regarded by the community as its representative merely. The king did not lose his representative character; but the coronation oath on the one side, the undertaking to be faithful on the other, made up the terms of a contract in which the fidelity of the subject was the consideration for a promise of good government by the king.

With these changes in the relation of king and subject came changes in the character of the consultative body through and with whom the king professed to act. The Witan, as I have said, represented, by a figure of speech, the wisdom of the community. The *Commune Concilium* of the Norman kings was in theory, and, on state occasions, in practice, an assemblage of the feudal tenants-in-chief. The group of earls, barons, and bishops who were consulted, or at any rate informed, when the king proposed to act, to legislate, or to tax, formed an inner group of habitual counselors. In either case the qualification for membership was tenure: and if the Norman assembly represented anything, it represented what we should now call the 'landed interest.' The time came, as we shall see in the Great Charter, when the larger assemblage of tenants-in-chief became an important check upon the Crown; but this was not yet.

There came too, with the Conquest, a great change in the administrative system. In the ill-compacted monarchy of the Saxons each shire was a complete administrative unit very slightly connected with the central government. When the duties of administration became too heavy for the king to discharge them in person, no attempt was made to divide those duties into departments and create a staff to discharge them. The kingdom was divided into ealdormanries, and thus the tendency to disunion, inherent in the Saxon polity, was increased.

¹ Glanvill. ix. c. 1. Littleton, ii. c. 1.

The great offices of the household were merely decorative. The High Reeve of Ethelred, the supposed counterpart of the later Justiciar, is a shadowy and uncertain figure. The Chancellor of Edward the Confessor indicates, we may be sure, a liking for foreign customs, rather than a move in the direction of administrative reform.

But under the Norman kings, justice and finance were dealt with as two departments of government, manned by a staff of officials and superintended by the great household officers and by the ministers who now begin to assume definite functions—the Justiciar, the Chancellor, the Treasurer.

The
Justiciar.

The Justiciar represented the king on all occasions when the king was not present, and the very existence of the office was largely due to the frequent absence of the king upon the continent. Moreover the Norman king dared not entrust large powers to local magistrates. Where he had to delegate plenary executive powers, he delegated them to a representative of himself for the whole kingdom: the very magnitude of the office made its holder a minister acting for the king, not a local potentate setting up independent local powers.

The Ex-
chequer
and its
staff.

When the king was abroad or absent from Curia or Exchequer he was represented by the Justiciar, *primus post regem in regno*, but the need to specialize duties became apparent as administrative requirements widened. To enforce the king's justice needed a strong judicial staff: to secure that good administration should be accompanied by a solvent Exchequer, independent of the feudal liabilities of the tenants-in-chief, needed a strong financial staff. The two were so intimately combined—the profits and costs of asserting and administering justice and the incoming and outgoings of the Exchequer—that the same men acted in a twofold capacity: the justices of the Curia sat as barons of the Exchequer; the Chancellor was great alike in Curia and Exchequer. The Treasurer's duties and anxieties were so engrossing as 'hardly to be set forth in words.' Thus the Curia and the Exchequer consisted of the same officers discharging different

The
Chan-
cellor.
The
Treasurer.

functions as *justitiiarii* or *barones*. But the Curia stood in closer relation to the *Commune Concilium*, since both were courts in which the king sat to administer justice; nor is it possible to say that there was a difference of jurisdiction between the two. The functions of the Curia would seem to have been entirely judicial, while the great Council dealt with questions of general policy, with legislation, with taxation, and, above all, with the election to the Crown.

In two ways these institutions are of permanent interest. The administration of Curia and Exchequer knit together local and central government. The justices of the Curia, itinerant throughout the land, declared and enforced the king's law, assessed and levied the king's taxes; while the sheriffs appeared twice in each year at the Exchequer to render account to the barons of the sums due from the shires.

And again, we can trace the beginning of the distinction between the executive part of our institutions and the legislative or deliberative, when we find a great Council meeting for general legislative and political as well as for judicial business, while the permanent administrative staff is in constant session at the Curia and the Exchequer.

Thus it is that for our purposes the Curia is an institution of more present interest than the *Commune Concilium*. For the latter, even in its most developed form, as set forth in *Magna Charta*, is only the feudal conception of a law-making and taxing body; it is not so much the parent as the feudal counterpart of that assembly, representative of shire and town, which was called into being by Simon de Montfort, which was organized and perpetuated by Edward I, which exists in a form adapted to our present requirements in the Parliament of to-day. But the Curia, the administrative centre, is the germ from which have developed the departments of Government. Whether we regard it collectively as a Council of the Crown, or whether we regard it as a group of officials—the holders of the new political offices created by the Norman kings—we can trace from it our Executive of to-day.

Thus we may say that the Norman monarchy, though practically absolute, nevertheless maintained the form of counsel and consent, extended the area from which the Common Council of the realm should be drawn, and gave a definite qualification, that of tenure, to its members; above all it created a strong central administration distinguishable from the larger Council, and drawing together by its vigorous action the local institutions of the country.

§ 3. *The Angevin kings.*

Kingship
in the 12th
century.

We have not yet reached Prerogative in the modern meaning of the term, because Prerogative is the result of a definition more or less complete of royal privilege and power, and the age of definition has not yet come. The ill-organized Saxon community put itself into the hands of a king and a body of non-representative advisers for all but local purposes. The Norman king tightened his hold on the community partly by means of the personal relation of feudalism, the great moral bond of society in the middle ages; partly by means of the territorial relation of feudalism which made him the ultimate lord of every man, and the immediate lord of the great men of the kingdom; partly by means of the vigorous administration which checked the growth of local jurisdictions and made the central power felt throughout the whole country. But for all this we see the rudiments of a control exercised by the community on the use of royal power. The Commune Concilium does represent the feudal society, and it is a machine regularly constituted, though not in regular working, for purposes of legislation and taxation, criticism and control.

And though it is true to say that until Parliament comes into existence we have not the means of defining, or approximating to a definition of Prerogative, as we understand the term, yet between the accession of Henry II and the Parliament of 1295 we can trace continuous progress, first in the development and the definition of executive functions—in less

abstract terms, the growth of departments of government; and next in the check or supervision of the exercise of these functions by a body more or less representative of the community. Three points in the history of the executive stand out prominently in this period of our history. The first is the increase of departmental activity in the reign of Henry II; the second is the definition of royal power and the rights of freemen in Magna Charta; the third is the dawn of the conception of a responsible executive traceable during the minority and through the reign of Henry III.

Henry II found a nation wearied out with the miseries of anarchy, and the nation found in Henry II a king with a passion for administration. Henry was determined to make his law prevail throughout the land, hence his attempt to define the jurisdiction of the ecclesiastical courts in the Constitution of Clarendon; his insistence in the Assize of Clarendon that no franchise or local jurisdiction should exclude his sheriff from entering therein; his requirement that his writ should initiate every suit relating to the freehold. All this needed a development of the judicial system, and we find this effected in two ways, from above, and from below. The royal administration of justice was strengthened and elaborated by the system of itinerant justices constantly modified throughout the reign, and surviving to the present day in the modern system of circuits; and further by the severance from the general work of the Curia of a body of judges who were to form a permanent court *in banco*, to hear all complaints, and to reserve cases of special difficulty to be heard by the King in Council.

But the royal administration of justice was further strengthened by its connexion with local machinery, the twelve lawful men of the hundred and four of the township who presented criminals to the king's justices, and the jury of sworn recognitors selected by the sheriff, who tried questions of fact as to the right to the freehold. As in justice, so in finance. New forms of taxation needed a better organized system for assessment and collection. This again brought

into play a further development of official machinery, while the practice of employing a local jury to determine local liabilities brings local and central administration into closer connexion.

It seems plain that this far-reaching system of administration would need a large official staff, and that the king, while he remained the centre of administration, must trust a good deal to his officers, and these in turn must rely upon the sheriffs of counties, who formed the connecting link between the central and local systems.

Thus departmental business increases, and the details of administration pass beyond the immediate control of the king, even of a king so busy and so acute as was Henry II.

The Great
Charter
defines
rights.

Next in order of time comes the statement contained in Magna Charta of the legal limitations upon the powers of the Crown. The importance of the Charter in the history of the royal prerogative consists in the definiteness and permanence which it gave to the promises of the Coronation oath. From the moment that John assented to the terms submitted to him by the barons, the rights of the subject ceased to depend on the power or goodwill of the king. Every freeman was henceforth entitled to freedom from arbitrary taxation and arbitrary punishment, and could refer for proof of his rights not to the vague promises of the coronation oath but to the formulated definition of liberties in the Charter.

Ministerial
responsibility.

Lastly, we find in the reign of Henry III the beginning of our modern ideas as to the relations of king and ministers, of ministers to the Common Council of the realm.

Henry III.

Tedious and inconclusive as are the struggles and bickerings which make up the history of this reign, its constitutional results are of great interest, quite apart from the development of the representative system by Simon de Montfort.

Out of the Curia of the earlier period proceed on the one hand specific departments of government and administration,

on the other a body of councillors through whom and with whose advice the king acts in matters of state. The Chancery, the Exchequer, the Common Law Courts separate from one another. The Exchequer has its own Chancellor to aid and check the Treasurer, the Courts acquire different jurisdictions administered by different bodies of judges. The Chancellor affixes the great seal to formal manifestations of the royal will, while the secretarial portion of his duties passes into the hands of the king's secretary, an official who from humble beginnings is to develop ultimately into the Secretary of State.

As the departments of government begin to assume definite shapes, the circle of royal advisers with whom questions of general policy are discussed and determined acquires a distinct character. The infancy of Henry III brought into existence a Council different on the one hand from the Common Council of the nation, and on the other from the central group of administrators. This Council, intended in the first instance to conduct the affairs of the kingdom while the king was a child, outlasted the temporary needs to which it owed its origin, and became a permanent and striking feature among our institutions. From this time some modern principles take their rise. The responsibility of ministers for the acts of the king dates from the time when the child Henry was the nominal head of executive government¹. With the responsibility of ministers comes the rule that 'the king can do no wrong.'

Then again there arose with the conception of a responsible ministry a desire on the part of the larger assembly, the Great or Common Council of the realm, to control the choice and the action of the king's ministers. This Council had chosen the regent and those who were to act with him on the death of John, and it would seem that the baronage were not willing to forego the position which they then assumed. Of this the Provisions of Oxford (1258) bear evidence², and

¹ Stubbs' Const. Hist. ii. 41. (§ 171.)

² Ibid. ii. 76-78. (§ 176).

though this claim was made at the time on behalf of their order, and not for the Common Council as representing the community at large, it was capable of being re-asserted on behalf of the larger and representative body which shortly came into existence.

SECTION III.

PARLIAMENT AND PREROGATIVE.

§ 1. *Limitations on royal action.*

The existence of Parliament renders it possible to form from henceforth some definition of the Prerogative of the Crown. Heretofore the king was the chief of a feudal society, his powers were limited by the promises made in the coronation oath, by the usage that he should only act with counsel and consent, by the action of an assembly consisting of his feudal tenants, and latterly by the terms of the Great Charter, which to some extent defined his relations to that assembly and to the community in general.

Parliament
represents
the Com-
munity

Parliament, as constituted by Edward I, was a representative assembly of the estates of the realm, and the action of Parliament, when asserting its rights in legislation, in taxation, in its relation to the executive, was the action of the people, declaring the laws by which they would be governed, the amount and sources of the funds to be expended on national objects, reviewing the conduct of those by whom public affairs are conducted.

as the
king had
ceased
to do.

And the king had long ceased to regard himself as the official representative of the community. Even the early Saxon Kings had been more than this; the dignity of a long pedigree and the sentiment of the *comitalus* combined to invest his position with a reverence which does not attach to an elected chairman or president. And since that time various causes had contributed to enhance the power and position of the king. The church, in the ceremonial of coronation, gave sacredness to the office, the king was not merely the chosen of the people, he was the anointed of God.

Feudalism added something both of moral and legal force to the relation of king and subject. The sentiment of fidelity due from the vassal to his lord enhanced the loyalty due to the king. No man might swear fealty to his immediate lord without reserving the fealty which he owed to the king; and in the sentiment of the middle ages the rebel was not merely a disturber of the public peace; he was a traitor to the lord whose man he had sworn to be. And the legal aspect of feudalism was a practical service to royalty. The king, who held the royal domain, was entitled to the services of his tenants by precisely the same right as the tenants in chief and lesser landowners held *their* lands and were entitled to *their* services. And since it was the tendency of feudalism to connect jurisdiction with land, to bind the feudal tenant to suit and service in the lord's court, the king's title to hold the Crown lands, to demand the services due to him, to act as the keeper of the peace of the community and its supreme judge, came to be regarded as a proprietary right. And as this proprietary right was of exactly the same character in its relation to the tenants in chief as their rights were in relation to their vassals, the interests of the feudal society were to some extent enlisted in the maintenance of the rights of the Crown. And besides all this, the king, if he was at all a capable man, was the strongest man in his dominions; he had the machinery of administration at his disposal, and could probably at any given time command more money, and put more men into the field, than any one of his barons.

The Crown
a property.

It is then small matter for wonder that men had come to forget, if indeed they had ever clearly realized, that the king existed for the purpose of representing the community—as the maintainer of its internal peace and order, of its external dignity and security. The rights of the king as law-maker, judge, and administrator were indeed limited by the customary rule that he must act through and with his Council; but these rights had come to be regarded as inherent, not delegated, just as the hereditary character of the title to the crown grew

Inade-
quacy of
restraints
on pre-
rogative.

at the expense of the elective. And the Council varied greatly in efficiency as a restraining power; sometimes its composition was settled by a powerful baronage, designedly as a check upon the king; sometimes under a strong king it consisted of royal nominees, ministers and feudal vassals who were merely the exponents of the royal will.

Parliament
tends to
define pre-
rogative.

The definition of Prerogative may be said to have consisted of the general doctrine that the king must govern according to law¹, of the rule that he must act through a Council, and of the fact that the members of this Council were amenable to the law. In practice the limits of royal power depended on the comparative strength of the king and his barons, and on the needs of the king. But when the estates of the realm were summoned to an assembly which claimed and was held entitled to take an initiative and a necessary part in the making of laws and the imposition of taxes, and to discuss all matters of national interest, a power arose capable of asserting itself against the power of the Crown; not, like the baronage, for the selfish purposes of the moment, but in order to settle the permanent relations of the Crown to Parliament and to the Law. The executive becomes a thing apart from the law-making and taxing body, the Crown in Council from the Crown in Parliament. Prerogative now assumes a definite form: it is the executive power of the Crown as contrasted with the legislative and taxing power of Parliament.

The king's
discretion

Elsewhere I have described the struggles of the Crown to retain all or any part of this law-making and taxing power²; they are part of the history of Parliament. My object here is to trace the discretionary power of the Crown in the determination of matters of general policy, and the practical control of the details of administration.

Parliament, by insisting on its right to control legislation and taxation,—the Courts of law, by requiring that the king's servants should observe the law of the land, gradually impose

¹ Bracton, bk. i. c. viii. s. 5.

² See Part I: Parliament, ch. ix.

strict limitations upon the exercise of the royal will. The first struggles begin over the choice of ministers. This becomes more important to the king as the sphere of administration becomes wider and its details more complex.

The claim made by the Commune Concilium in the reign of Henry III, by the magnates in the reign of Edward II, to have a voice in the nomination of the king's ministers and to control their action, was revived by Parliament in 1371, when the old age and failing powers of Edward III and the minority of Richard II had given increased importance to the executive powers of the Council. The Commons desired to control these executive powers by securing the nomination and election in Parliament of the chancellor and the lord privy seal, through whom chiefly the royal will was expressed; of the treasurer, who was responsible for the public income and expenditure; of the chamberlain, whose official duties were varied and important; and of the steward of the household, who was responsible for the economy of the Court and the maintenance of the royal state.

But in 1385 Richard refused point-blank to name his intended ministers to the House of Commons; and the nomination of ministers in Parliament does not recur in his reign. Beyond the audit of accounts the only check which the Commons could use was by the process of Impeachment¹ for such political offences as were outside the ordinary course of law.

But very early in its existence the House of Commons seems to have become aware that for the control of the Crown in administration it was of supreme importance to secure the independence of the Courts and the publicity of judicial procedure.

The king might delay a cause or withdraw it from the Courts by writs issued under his lesser or privy seal², or he

¹ See Part I: Parliament, ch. x. § 2.

² 28 Ed. I, c. 6. No writ concerning the Common Law was to go out under the little seal.

³ Ed. III, c. 8. Neither great nor little seal should be used to delay common right; if so used the justices should pay no attention to such commandments.

might grant charters of pardon¹ so wide in their terms as to amount to a dispensation to commit crime. These were the earliest grievances, and they were dealt with by Statute.

Or a man might be summoned by writ of *subpoena* before the Council, where the king seems to have continued to preside after he had ceased to sit in the King's Bench. The powers of the Council were undefined and arbitrary, and its procedure deprived the parties of a jury. It was in vain that the Commons sought to destroy this jurisdiction or to control its exercise². It developed in spite of the Statutes and the protests of the fourteenth and fifteenth centuries until opposition died away, to return with conclusive effect in the legislation of 1641.

But the instinct of the Commons was a true one. The prerogative must be limited by law if it was not to be limited by force, and legal restraints were of no avail if the king could constitute or control the Courts which interpreted the law.

¹ 2 Ed. III, c. 2; 10 Ed. III, st. 1, c. 2; 14 Ed. III, c. 15; 13 Ric. II, st. 2, c. 1.

² Statutes on this subject are numerous. They begin with generalities.

5 Ed. III, c. 9. None shall be attached or forejudged contrary to the Great Charter or the law.

28 Ed. III, c. 3. None to be put out of his lands or imprisoned, disinherited or put to death but by due process of law.

Then they become more explicit.

42 Ed. III, c. 3. No man to be made to answer before the King's Council on accusation to the king without presentment before justice or matter of record, or by due process and writ original according to the law of the land.

4 Hen. IV, c. 23. No man to be brought before the King's Council or king himself after judgement given in the Common Law Courts.

15 Hen. VI, c. 4. The writ of *subpoena* only to be issued after security given for costs.

The protests of the Commons are very numerous; but if a petition was in the first instance addressed to Parliament they were not unwilling that it should be referred to the Council. In 14 Ed. III, c. 5, they legalize such reference in case of delay of justice ascertained by a committee of five (one bishop, two earls, and two barons), and in 31 Hen. VI, c. 2, they gave power to the Council to deal in a summary way with great offenders against public order, saving in a somewhat ineffectual proviso the rights of the Common Law Courts.

§ 2. *The Lancastrians.*

The growth of individual departments of government is not more important than the growth of the collective powers of the Council. In the reign of Richard II it had 'become a power co-ordinate with the king rather than subordinate to him, joining with him in all business of state, and not merely assisting but restricting his action¹.' In this capacity it is recognized by the Commons, who, early in the reign of Henry IV, ask that the Lords of the Council, as well as individual ministers, should be nominated in Parliament (1404), that they should be properly paid for their services, and that the procedure of the Council should be settled by fixed rules (1406). In every department of the executive, except the administration of justice in the Common Law Courts, it was the duty of the Council to advise the Crown; and there soon follows the assumption by the Council of judicial powers which to some extent supplemented, to some extent superseded, the action of the Courts.

During the infancy of Henry VI the Council was not merely a body of advisers, but a Council of Regency; and during this time it was nominated not merely in Parliament but by Parliament. On the attainment of his majority by the king, this practice ceased; the Commons relaxed their attempts at control, and the Council became the nominees of the Court. Under the weak rule of Henry VI the commoners and men of business became fewer at the Council Board². Great lords of the Lancastrian side take their place, and the powers both of the Commons and of the Council at this period increased at the expense of the personal influence of the Crown.

The Commons had acquired an increased and extensive control over taxation and legislation, and by the practice of

¹ Stubbs, Const. Hist. iii. 247.

² Fortescue on the Governance of England, ed. Plummer, p. 146; and see Mr. Plummer's note, pp. 295, 296.

impeachment they could strike an individual minister, but they failed to use this power to keep a steady and consistent criticism at work on the action of the executive.

Disorders
of the 15th
century.

The Council had become a committee for the discharge of executive functions, irresponsible, except in so far as responsibility was secured by the royal power of appointment and dismissal, and by the possibility that the Commons might exercise in individual cases their right to impeach. The range of duties undertaken by the Council covered the whole range of the powers of the Crown. In judicial matters the complaints that the Council interfered with the action of the Common Law Courts continue for a while, but cease after the reign of Henry IV¹. The lawlessness of the country, and the difficulty of obtaining justice when great lords set the common law at nought, may well have reconciled the Commons to the intervention of the Council. In truth at this time we get an outline of constitutional government which seems to disappear when we look into details. The king reigned by a strict Parliamentary title; the House of Commons had acquired a control over legislation and taxation²; the royal Council was exercising with vigour the administrative powers of the Crown³; and yet 'the Treasury was always low, the peace was never well kept, the law was never well executed; individual life and property were insecure; whole districts were in a permanent alarm of robbery and riot⁴.' This local anarchy was wrought by great and rich nobles with the bodies of armed retainers who had followed them in the French wars, and now wore their livery and were maintained by their bounty. The ordinary course of justice was impotent against these men: the king himself could scarcely resist any combination of them. The Wars of the Roses were a sequel to the long disorders of the fifteenth century.

¹ Stubbs, Const. Hist. iii. 252.

² Ibid. 255.

³ Ibid. 250.

⁴ Ibid. 270.

§ 3. *The Tudors.*

From the conclusion of the Wars of the Roses to the time of the Stuarts, from Fortescue to Bacon, the minds of political thinkers, practical or theoretical, seem to have turned towards the construction of a strong administration. It was not only that the turmoil of the dynastic struggle had created a longing for peace: the preceding disorder, and the insecurity of life and property which was not inconsistent with great constitutional freedom, made men realize that an increase in the power and influence of the House of Commons was not all that was needed to make a nation prosperous and free.

Popular
acquies-
cence in
Tudor
rule.

The constitution of the king's Council for purposes of administration was the problem set to himself by Sir John Fortescue, who troubles himself little as to the relations of Parliament to the servants of the Crown, but much as to the organization of the executive. The distribution of the work of the Council received much attention from Henry VIII and Edward VI; they divided the whole body into committees for the transaction of special business or for immediate attendance upon the king: the course of its business was regulated: the precedence of its important members determined by Statute.

A strong
executive.

And since the great nobles had been reduced by the Wars of the Roses in numbers, power, and prestige, the Council possessed no members of such individual weight or importance as would enable them to resist the royal will. It was an administrative machine of vast power, entirely in the hands of the Crown.

Position of
Council

The period fancifully styled the New Monarchy, the period at which the personal government of the Crown is more distinct than at any time since the reign of Henry II, was at once the outcome of the executive weakness of the Lancastrians, and the source of the violent collision of Crown

and of
Parlia-
ment.

and Parliament under the Stuarts. But it should be remembered that the people were as willing to be governed as the Tudor kings and queens were able and willing to govern, and that throughout the reign of Henry VIII Parliament seemed ready to confer upon the Crown any powers which Henry VIII might be pleased to ask.

Statutory
Preroga-
tives con-
ferred.

Henry borrowed money without consent of Parliament, but he obtained from Parliament a release from the obligations incurred to the lenders. Parliament gave him the power of devising the Crown, enabled him to issue Proclamations which should have the force of law, and enabled a king, when he reached the age of twenty-four, to repeal any statutes made since his accession; above all, it was Parliament, embodying the acts of Convocation, that made the king the legal head of the national Church, that passed the many acts of attainder which give a tragic and gloomy colour to the concluding years of this reign.

Other
exercises
of preroga-
tive.

In two respects we see the Crown in the reign of Henry VIII developing a policy and exercising powers which became formidable when, as happened in the succeeding reigns, individuals began to desire a free expression of opinion on matters affecting Church and Commonwealth, and when Parliament revived its interest in public affairs. One of these developments of executive power is manifested in the judicial action of the Council. The administration of the Common Law had been committed to the three great Courts, the King's Bench, the Common Bench, and later to the Exchequer. The imperfections of the Common Law were supplemented in the Chancery, where the Chancellor was the mouthpiece of the King's grace, but the indefinite residue of the judicial powers of the king was administered by the Council. Of the obscurity which overhangs the growth of these powers, and of the relations of the Council and the Star Chamber, I will speak in a later chapter. Here it is enough to note the compass and detail of the judicial work which the Council is found to be doing when, after a long

(a) Judi-
cial action
of Council.

gap in its records, we can once more follow its action in the reign of Henry VIII¹.

These powers do not seem at first to have been designedly exercised by the Crown at the expense of the liberties of the subject. The Common Law Courts were costly and difficult of access to poor men, they were not always effective against rich or powerful wrong-doers²; conspiracies which survived from the dynastic wars needed to be met by prompt and secret action; new questions arose out of ecclesiastical changes, and the growth of a Press, to which existing rules of law supplied no answer. Petitions for redress of grievances were laid before the Council; often it was only here that justice could be obtained speedily and at small cost by the poor; often too it was only here that justice could be obtained at all by the weak. It was only by degrees that the Court of Star Chamber became a Court for the restraint by an arbitrary procedure of the free expression of opinion on political subjects, that it enforced illegal proclamations by unauthorized penalties, that it no longer supplemented but interfered with the ordinary course of justice in the Courts of Common Law.

Thus the jurisdiction of the Council, dangerously indefinite, but on the whole salutary in its exercise under Henry VII, had become a formidable engine of oppression before the death of Elizabeth.

And, secondly, Henry VIII began the practice of increasing the House of Commons by additions to the number of the constituencies, a policy which was developed, in the hands of his successors, by a free use of the prerogative in granting charters to towns.

The statutory requirement that a member should be resident in his constituency had fallen into disuse³, and a seat in

¹ No regular record of the proceedings of the Council is extant between 1435 and 1540. As to the variety of judicial business transacted by the Council in the reign of Henry VIII, see *Proceedings and Ordinances of the Privy Council*, vol. vii. p. xxv.

² *Collectanea Juridica*, vol. ii. p. 14.

³ See Part I: Parliament, pp. 87, 319.

(b) Additions to the constituencies.

Parliament had not yet begun to be an object of ambition. Henry VIII had therefore no great difficulty in procuring the election to the House of Commons of many members who held places at the pleasure of the Crown, or who hoped to obtain such places, or who for one reason or another were willing to vote as the king or his minister might direct. The successors of Henry VIII¹ were not content to rely upon influence over existing constituencies; they issued writs of summons to boroughs which had never heretofore sent members, a process followed usually by a charter of incorporation, conferring upon the borough the privilege of sending members, and regulating the rights of election. In this way the numbers of the House of Commons were increased by more than one hundred members in the reigns of Edward, Mary, and Elizabeth, and the growing independence of Parliament was sought to be restrained by a larger infusion of nominees of the Crown.

Prerogative under Henry VIII.

The raising of loans without consent of Parliament, the exercise of a wide and indefinite jurisdiction through the Privy Council, and the acquisition of a Parliamentary influence by an increase of the representation and by the introduction of placemen and courtiers into the House of Commons, constitute the chief exercise of prerogative in the reign of Henry VIII. Many deeds undoubtedly cruel and unjust were done, and laws were passed which placed a dangerous power in the hands of the Crown; but to these matters Parliament was made a party, and the blame must be divided in such proportions as the student of history may see fit between a king who loved his own way, a complaisant legislature, and a people which was willing to forego some measure of constitutional liberty for the sake of order and peace.

Under his successors.

Under Edward VI and the Tudor queens the jurisdiction of

¹ The constituencies added by Henry VIII, though considerable in number, were places which might reasonably demand representation: Cheshire and Chester, Monmouthshire and Monmouth, the towns and counties of Wales.

the Council pressed more heavily upon freedom of opinion, and the franchise was conferred upon boroughs which were never intended to be other than corrupt. Yet, in spite of the exceptional control which these monarchs exercised in Council and in Parliament, as regards the detail of administration, the king during this period distinctly recedes into the background; his will is all-powerful, but it must be expressed through his servants. Edward IV had been told already that he could not effect an arrest in person¹, and James I had to learn that the king could not sit as judge in his own Courts². An Act of Henry VIII³ requires the concurrence of three of the king's servants for affixing the great seal, and the recorded Acts of the Council in the reign of Edward VI make various provisions as to the official signatures necessary to authenticate a document signed under the king's own hand⁴. It was held in Elizabeth's reign that a royal order was not a sufficient authority for the issue of the royal treasure⁵.

Restraints
on admin-
istrative
action of
king.

§ 4. *The Stuarts.*

When James I came to the throne it was no longer easy to manage Parliament as it had been managed by the Tudors. The House of Commons had questioned some of the additions made by Elizabeth to the representation. It took an early opportunity of disputing the right of the Crown to interfere in elections or to determine disputed returns. The Stuarts did not venture to use to any extent the prerogative which the Tudors had so freely exercised of summoning boroughs by writ or conferring the right to representation by Charter. The additions to the representation made in the reign of James I were in almost all cases revivals of rights fallen into disuse. But James I and Charles I raised other and bolder issues. The judicial powers of the Privy Council exercised in

The exer-
cise of
Preroga-
tive by the
Stuarts,

¹ Coke, Inst. ii. p. 186.

² 12 Coke, Rep. p. 64.

³ 27 Hen. VIII, c. 11.

⁴ Acts of the Privy Council, lii. 366, 411, 500.

⁵ 11 Coke, Rep. p. 92.

the Star Chamber, and the power of appointing and dismissing at pleasure the judges of the superior Courts, enabled the Crown to interfere with the freedom of the subject, to legislate and to tax in defiance of statutes passed in earlier times, in defiance even of the Petition of Right, which was aimed at existing encroachments of the Prerogative.

aided by
theory of
divine
right,

It is possible that the difficulty of managing Parliament or increasing its members may have induced the Stuarts to fall back upon unparliamentary methods. But it must be remembered also that the decay of feudalism, and the Reformation, which broke up the unity of Western Christendom, left men in want of some theory of political duty which should supply the place of the feudal bond, and meet the new conditions of a national Church. The divine right of kings was one solution, eagerly embraced by the Stuarts and accepted by many of their subjects. A reluctance to resist encroachments on liberty of person and security of property enabled the royal powers to be used with freedom and boldness.

but based
on control
of judicial
adminis-
tration.

But those powers did not rest on imagination only: they had a firm basis in the control which the Crown possessed over the course of law.

The Star
Chamber.

So long as the king could use the indefinite jurisdiction of the Star Chamber for the infliction of punishments for political offences, it was possible for him to issue proclamations which would be enforced by fine or imprisonment in the Star Chamber, although disobedience to them might not constitute any offence recognizable by the Common Law Courts¹. It is true that the use of this power by James I led to a precise definition by Sir E. Coke of the legal effect of such proclamations, a definition which, as I have elsewhere pointed out, is the *locus classicus* for the statement of the relations of Parliament and Crown in the making and enforcement of law². But while the Star Chamber was at the service of the Crown it represented a judicial power residing in the executive,

¹ Gardiner, *History of England*, viii. 73, 77.

² Part I: *Parliament*, p. 294.

limited by no settled rules, exerciseable at the royal discretion, and alleging the interests of government as the ground of its exercise.

Nor did the king's control of justice stop at the Star Chamber. He had an absolute power in the appointment and dismissal of judges: the judicial bench was, as to tenure of office, at his mercy, and without exaggerating charges of corruption and subserviency, it is plain that self-interest as well as the traditions of a hundred years would lead the judges to take a broad view of the extent of their master's prerogative. The Bench.

When a subject refused to pay a duty imposed or a tax levied without consent of Parliament, the Courts, if they did their duty, were bound only to consider whether there was authority by Statute or at Common Law for the demand made by the Crown. If an emergency necessitated the raising of money without the consent of Parliament, the Courts were not concerned with the existence of such an emergency; their business was to interpret Statute and Common Law. Imminent peril might justify the Crown in raising money, but the justification should be recognized, not in a decision by the law Courts that the Crown was justified in overriding the law, but in an act of indemnity passed by Parliament to relieve those who had done the royal bidding in breach of the law. The duty of the judges,

Nevertheless, the judges of James I and of Charles I went far in the direction of the theory held by Bacon¹, that their business was not merely to declare the law but to support the government; acting on this theory they developed a doctrine of the prerogative which virtually set the king above the law. If, whenever a subject resisted an illegal demand, the Courts held that the demand was justified by a discretionary power resident in the king, they reduced themselves to a choice of difficulties. Either they must consider the circumstances of each case and determine whether it called for the use of this discretionary power, and their interpretation of it,

¹ Gardiner, ii. 191; iii. 2-8.

and so take upon themselves the deliberative functions of a Council of the Crown, or they must leave it to the king to say when this power should be used, and in that way must set the Crown above the law.

and its
results.

The last was the course which the judges adopted¹. They thereby made the king independent of Parliament so far as revenue was concerned. Nor did their action affect revenue alone: all attempts to define the prerogative by rules of law were rendered nugatory when the Courts held that it was of the essence of prerogative to decide whether or no the law of the land should be observed. What the Star Chamber did for the king in the region of legislation, the Common Law Courts did for him in the region of finance and in his dealings with the liberty of the subject.

Effect of
the Long
Parlia-
ment;

and of the
Common-
wealth,

The Long Parliament took away the jurisdiction of the Privy Council in civil and criminal matters, and in so doing struck off a formidable branch of the royal prerogative. But the episode of the Commonwealth did far more than legislation could do to affect the powers of the Crown as then existing.

The prerogative of the English king had not rested on an armed force for its maintenance, but on custom and respect for law, and to some extent on imagination, and an acceptance of the existing order of things as a part of the scheme of nature. The issue of the war between King and Parliament showed that there was no such miraculous attribute in the

¹ 'In cases touching the prerogative, the judgement shall not be according to the rules of Common Law.'

'The king's power is two-fold, ordinary and absolute . . . The absolute power of the king is applied for the general benefit of the people, and is *salus populi*, as the people is the body and the king the head; and as the constitution of the body varies with time, so varies this absolute law, according to the wisdom of the king, for the common good.' Judgement of Court of Exchequer in *Bate's case*, 2 St. Tr. 371.

'That which is now to be judged by us is, whether one committed by the king's authority, *no cause of commitment being set forth*, ought to be delivered on bail, or to be remanded to prison.' The Court of King's Bench held that one so committed ought *not* to be delivered. *Darnel's case*, 3 St. Tr. 1.

prerogative as would enable the king and his followers to resist superior numbers or superior organization. The nation learned that, in the last resort, force could keep the king within the bounds of law unless he had a greater force at his back. The right to maintain a standing army became a practical question from the time of Cromwell.

And there still remained within the limits of law a formidable weapon,—the king could still dismiss the judges at pleasure. No attempt was made by Charles II to use this power in order to raise money: it would have been dangerous to trifle with the stringent legislation of the Long Parliament on this subject, and Charles, alike from levity of temper and practical cleverness, was disinclined to run risks or to disturb his enjoyment of life for a mere extension of the powers of the Crown. He was content to establish a system of Parliamentary influence and corruption, and thus to induce members to vote as he wished. It was not until the unhappy James II desired to get rid of the Statutes passed for the security of the English Church that the powers of the Crown over the judges were again used to obtain a judicial sanction for illegal acts. When James desired to dispense with the operation of a Statute and to do so with the sanction of the Courts of law, he raised the question by means of a suit brought against the man in whose favour the dispensation was given, and secured such a decision as he desired by bringing pressure to bear upon the judges¹. Nor was he contented with the misuse of an undoubtedly legal prerogative; he had learned from the Commonwealth the importance of a standing army, and was creating one when the Revolution came upon him.

The Bill of Rights recited all the outstanding points of dispute between king and subject, the standing army among others, and decided them against the king; and the Act of Settlement took from the king the last of the prerogatives which enabled him to interfere with the course of the Com-

in raising
the ques-
tion of a
standing
army.

The last
Stuarts.

Corrup-
tion of
Parlia-
ment.

Control
of the
Bench.

The stand-
ing army.

The Bill
of Rights.

¹ Part I. Parliament, p. 300. *Goddan v. Hales*, 2 Shower, 275.

mon Law, or to override Statute, when it provided that the judges should hold their office during good behaviour, and could only be dismissed upon address of both Houses of Parliament.

Henceforth the theory of divine hereditary right lived on only in the imaginations of those who mingled politics with romance. The Crown becomes the official representative of the community, to carry out its wishes so far as they are expressed or can be ascertained.

SECTION IV.

THE PREROGATIVE SINCE 1688.

§ 1. *The dependence of the Crown upon Parliament.*

Constitutional
Monarchy.

1 Will.
and Mary,
st. 2, c. 2.

12 & 13
Will. III,
c. 2, s. 3.

Depen-
dence of
Crown on
Parlia-
ment

The legislation of the reign of William III had done two things in respect of the royal prerogative. It had defined the legal rights of the Crown, and it had taken from the Crown the means of controlling the interpretation of those rights. The king was forbidden by Statute to raise money or keep a standing army in time of peace without consent of Parliament, to suspend laws or to dispense with their operation as James had done; but this was not enough. Judges who owed their places to the king's favour, and risked them by incurring his displeasure, had been able to disregard the Petition of Right in Hampden's case and the Test Act in Hale's. From the day that the Act of Settlement gave to the judges security of tenure and made them ultimately responsible to Parliament, the king's Courts existed no longer to do the king's pleasure, but to interpret and enforce the law of the land.

The risk of oppression by the Crown and its officers, whether by claim of legal right or by partial interpretation of law, was now reduced to a shadow. In all administrative acts, the king's pleasure could only be expressed through

officers amenable to the Courts of law. In the choice of ministers and the determination of matters of general policy, two things remained to be done in order to bring the exercise of the prerogative under the criticism and supervision of the estates of the realm. The first of these was to compel the Crown to have frequent recourse to Parliament, the second was to bring the choice and the action of the King's ministers under some sort of Parliamentary control.

The first of these objects was attained when Parliament for money: limited the king's life revenue to such a sum as would barely enable him to conduct the civil business of government; when it legalized the standing army, and granted supplies for the national armed force, every year for no more than a year.

The second was the gradual result of all the preceding ^{for approval of policy.} limitations, whereby the King was made dependent upon the goodwill of Parliament for money and for legislation. From the Revolution onwards the King was not only prevented from taxing without consent of Parliament—he was not entrusted with more money than would suffice to conduct the business of the country for a year at a time. Not only had he no longer a Court of Star Chamber to enforce his Proclamations—his power to suspend and dispense with Statutes was declared to be unlawful. The Act of Settlement made it impossible for him to rely upon a packed bench of judges who would hold that he might break Statutes in virtue of his discretionary prerogative; nor could a pardon granted beforehand shelter a Minister from impeachment behind the irresponsibility of the Crown. He could not add to the borough representation by giving charters, for the Commons were prepared to question his right to add to their number: he could not tamper with existing boroughs by the forfeiture and remodelling of their charters, for the judges before whom the validity of such charters would be contested were no longer under his control.

Thus between 1688 and 1701 the King was precluded from the use of force, the misapplication of public money, the perversion of law; and was compelled to have recourse continually

The
Commons
and the
King's
ministers.

to a House of Commons whose composition he could not alter, and whose members he could not intimidate. It still was possible for him to influence individual members by inducements of personal advantage. Hence the clause in the Act of Settlement, which never came into force, making office or place of profit, held of the Crown, incompatible with a seat in the House of Commons, and hence the legislation of 1707, and the official disqualifications created by subsequent Statutes¹.

The House of Commons, in thus disabling office-holders, failed to see that it had more to gain by bringing the King's ministers into dependence upon itself than by cutting itself adrift from the executive in fear of royal influence upon legislation. Through Ministers alone could the Crown effectually communicate its wants to Parliament, and Parliament, by the readiness or reluctance with which it met the needs of the Crown, could indicate the amount of satisfaction with which it regarded the persons whom the Crown employed to conduct the business of government.

Since the Bill of Rights and the Act of Settlement have brought the prerogative within legal bounds which the King cannot transgress, it remains to ask, What is the discretionary power of the King, as the executive of the country, within those bounds. And the questions to be asked are three—

(1) Is the King free to appoint and retain such Ministers as he chooses?

(2) What is the influence of the King in the settlement of general policy?

(3) How may the King act in matters of administration?

§ 2. *Parliament and the choice of the Ministers of the Crown.*

Here is the only important point of contention between Crown and Parliament since the Revolution. The King has claimed to choose Ministers irrespective of the wishes of the House of Commons; the Commons have insisted that the

¹ Part I. Parliament, pp. 76, 90.

Ministers of the Crown shall be chosen from the political party which is in a majority in the House, and that their tenure of office shall depend on the retention of the confidence of that majority.

The composite Ministries of 1689–1696 gave way to the Whig Ministry of 1697, as Sunderland made William III understand that he must rely upon one party or another if he wanted the support of a majority of the House of Commons for his policy; the Whig Ministry of 1697 passed by degrees into the Tory Ministry of 1700, as William perceived that a change of feeling in the country, represented by a change in the balance of power in the House of Commons, necessitated a corresponding change in his advisers. But it was in the reign of Anne that the necessary dependence of the Queen and her advisers upon one or other of the two great political parties became strongly marked.

The
Ministries
of William
III.

Godolphin, the Lord High Treasurer, and Marlborough, the Captain General, in the first ministry of Anne, found the country committed to a European war the policy of which they approved. In this they differed from the bulk of the Tory party to which they belonged. They tried to balance parties and obtain a following for themselves, but they had to learn by experience that it is difficult for more than two parties to exist where political feeling is strong. At this time there were two parties and no more. The Whigs were for war with France, for religious toleration and for the Hanoverian succession. The Tories were for peace, were averse to standing armies, staunch upholders of the privileges of the Church, and somewhat lukewarm in their sentiments towards the Electress Sophia.

Anne and
Godolphin.

At the beginning of Anne's reign the war was the dominating feature in the policy of the country, and Marlborough and Godolphin tried to form a Tory war party; they found it was a hopeless task; they had to rely upon the support of the Whigs for their supplies, and in time the Whigs claimed office as the price of support. But though her chief Ministers

Party
govern-
ment
under
Anne ;

were willing to ally themselves with their political opponents, the Queen resented their demand that she should employ persons whose opinions she disliked. When in the full tide of military success Godolphin and Marlborough made the dismissal of Harley a condition of their retaining office, the Queen reluctantly dismissed Harley, and with equal reluctance allowed the great offices of state to be filled by Whigs. But she watched the turn of popular feeling, and when she became assured that the feeling of the country was changed and that the Whigs were unpopular, she dismissed them one by one and recalled Harley and St. John.

In the history of the time the rudiments of party government appear. The personal wishes of the Queen have great influence ; a ministry does not stand or fall together, but ministers of one party replace ministers of another by a gradual process of change. And yet the opinion of the country represented by a majority in the House of Commons determines the Queen's choice, and by that opinion she must abide.

under the
Hanover-
rians.

The first two Hanoverian kings were necessarily dependent upon the party which had placed their dynasty upon the throne. Political interest had languished throughout the country, but Parliamentary management under the hands of Walpole became a means of securing a working majority to a minister who knew its secrets. Thus the House of Commons was used by the party managers to put pressure upon the king, and George II was constrained, not without grumbling, at one time to part with Carteret whom he liked, at another to employ Pitt whom he detested. George III tried, and not without success, to get the machinery of Parliamentary corruption into his hands, to break up parties and all sense of collective responsibility in his ministers. But the jealousy which was stirred by this extension of royal influence gave a new life to party loyalty. For the first time since the Jacobites had fallen out of practical politics, we now find a party, the Rockingham Whigs, bound together not as embarked in a joint adventure in search of office, but as

sharing some sort of common aspiration for the better government of the country.

Little as the Parliaments of the eighteenth century could be said to represent the wishes of the people, yet the revival of political interest, stimulated by the war of American Independence, did put some constraint upon the inclinations of the king. Public opinion compelled the retirement of North (1782); confirmed the King's action in dismissing the coalition ministry (1783); and gave to the younger Pitt a majority in the Parliament of 1784, which made him independent of royal intrigues. This awakening of public opinion was intermittent, but as the eighteenth century closed, the House of Commons became more independent; the grosser forms of corruption disappeared with Lord North. Still the likes or dislikes of George III could make or mar the fortunes of statesmen, and the influence of the royal wishes, though waning, was still perceptible throughout the Regency and the reign of George IV.

Increase
in Parlia-
mentary
inde-
pendence :

The Reform Bill of 1832 made the House of Commons in representative of the rising middle class and the manufacturing interest. Weight was thus given to a Parliamentary majority, and the increased interest in politics which creates and enforces party loyalty held the majority together. The pressure of such majorities upon the choice of the Crown now became irresistible. William IV did not resist it. The statement often made and long believed, that he dismissed Lord Melbourne's Ministry upon personal grounds, is disproved by the testimony of Lord Melbourne himself¹. Queen Victoria has invariably accepted the decision of the country as shown by a general election or a vote in the House of Commons. Ministers are the Queen's servants, but they are chosen for her by the unmistakeable indication of the popular wishes given at the polling booth or in the division lobby. Legal theory and actual practice here, as elsewhere in our constitution, are divergent.

strength
and co-
hesion of
majorities.

¹ Melbourne Papers, pp. 220-226.

§ 3. *The Crown and its Ministers in the Determination of Policy.*

Policy
settled by
Ministers.

The business of government, like all other business, passes through two stages,—the determination of policy or principle, and the working out of detail; the settlement of what is to be done, and the doing of it.

Absence
of King
from
Cabinet
meeting.

The general policy of the country, its foreign relations, proposed legislation, the principles of departmental management, are discussed and settled at the meetings of those great officers of state who are at the same time leading politicians and party leaders, and who constitute the body known as the Cabinet, of which more hereafter. At these meetings the Sovereign has ceased to be present since the death of Anne. At meetings of the Privy Council the Sovereign has been and is personally present, but the business at such meetings is of a formal character. When first the discussion of general questions of policy passed from the Privy Council to that inner circle of advisers which we call the Cabinet, a period which we may fix at the commencement of the reign of Charles II, the Sovereign presided alike in Cabinet and Council: the personal opinion and wishes of Charles, of William and of Anne¹, formed an important factor in the discussions which took place and in the conclusions reached. George I had difficulties in understanding our language, which made his attendance at these meetings alike useless and irksome. He absented himself, and his example has been so consistently followed as to have become a settled custom².

Effect of
King's
absence.

But the custom introduced by George I had far-reaching

¹ See a curious note by the editor of the Hardwicke Papers, ii. 482.

² Mr. Todd (*Parliamentary Government in England*, ii. 115) records three instances of occasions on which the King has been present at a Cabinet meeting since the accession of George I. Two of these are formal meetings to lay before the King the draught of the speech to be made at the opening of Parliament (*Hardwicke, Life*, ii. 231; *Hervey, Court of George II*, ii. 555): the third is of very doubtful authority (*Waldegrave, Memoirs*, 86). As exceptions from the established rule they are wholly unimportant.

effects. The absence of the Sovereign from the meetings of the body which discusses and settles the general policy of government does not alter the legal rights of the Crown, the legal liabilities of its Ministers, or their legal relations to one another, but it necessarily puts the Crown somewhat into the background so far as influence on policy is concerned.

Ministers can only carry their policy into effect through the agency of the Crown. If the Queen refuse to sign the necessary documents or give the necessary assent, the thing which the Ministers wish to be done cannot be done. But Ministers may say that they will not remain Ministers unless their policy is carried out; and Parliament may say, and the electorate may support it in saying, that it will have no other Ministers and no other policy. To be present and have a voice in the determination of that policy is therefore an additional security to the Sovereign that the policy will be such as he can cheerfully carry out. There is a great and obvious difference in the influence of a Sovereign presiding at a discussion upon which a decision is formed, and that of a Sovereign who merely receives the decision of his Ministers as the result of their collective opinion. The position of affairs has been reversed since 1714. Then the King or Queen governed through the agency of Ministers, now Ministers govern through the instrumentality of the Crown.

Another result of this retirement of the Sovereign from meetings of the Cabinet has been to make him as free from responsibility in the determination of general policy as he had been for a long time in executive action. This could not be while the King took an active part in the discussions at which the policy of the country was settled. He was not regarded as free from such responsibility by his Ministers, nor did he so regard himself. Danby, in 1678, formally pleaded a pardon under the Great Seal in bar of an impeachment. Somers, in 1701, alleged the King's command as his warrant for affixing the Great Seal to powers to treat and ratifications of treaties, and disavowed all responsibility for the terms of

Loss of
con-
trolling
Power.

His free-
dom from
respon-
sibility.

the treaties¹. It would have seemed as though the provision of the Act of Settlement, that a pardon should not be pleaded in bar of an impeachment, was designed rather to secure the liability of the Minister than to remove that of the King. William III complained that the hesitating advice of his Ministers threw upon him the responsibility of directing the movements of the fleet². Yet he was not usually wanting in self-reliance, and Sunderland regretted that he did not oftener 'bring his affairs to be debated' before the Cabinet³.

Gradually
recogn-
nized.

The beginning of the change is noticeable in a curious debate⁴ in 1711 on a motion of censure on the Queen's Ministers for the mode in which they had carried on the war. 'For several years past,' said Lord Rochester, 'they had been told the Queen was to answer for everything; but he hoped that time was over; that *according to the fundamental constitution of this kingdom Ministers are accountable for all.*'

It was doubtless largely due to the position occupied by the first Hanoverian kings that the non-intervention of the Crown in active political discussion passed so rapidly into a settled convention. But it was also inevitable that when the primary responsibility of Ministers came to be acknowledged, the King could not continue to act alone. If Ministers are responsible for every act of the Crown they may fairly insist that such responsibility should not be laid upon them without their knowledge and consent. Hence there has come about a change in the whole character of the relations of the Crown to its Ministers, since the reign of Anne. No act of State can be approached, resolved upon, or done, without the inevitable intervention of the responsible Minister.

Independ-
ence in
political
action,

William III arranged the terms of the first Partition Treaty and induced Somers and Vernon to send him powers in blank, to enable him to conclude a peace with France on terms to which they were only permitted to give a hurried and formal

¹ Parl. Hist. v. 1272.

² Shrewsbury Correspondence (Coxe), 68.

³ Hardwicke State Papers, ii. 461.

⁴ Parl. Hist. vi. 972.

approval. Anne wrote despatches and interviewed foreign Ministers ¹. At the present day the Queen, as we know from the episode of Lord Palmerston's dismissal in 1851, desires to be informed of all important communications with foreign powers, and to have an opportunity of expressing an opinion upon them; but it is the modern practice uniformly observed by George III, and only for a short time broken by George IV, that the Secretary of State for Foreign Affairs should be present at every interview between the Sovereign and a foreign Minister ², and so far is the Crown from taking independent action in foreign affairs that all letters addressed to the Queen and the late Prince Consort by foreign princes, or received from them, were shown to the Foreign Secretary or Prime Minister ³. And the same rule applies in domestic affairs.

When George IV desired that the prerogative of mercy should be exercised in the case of a person sentenced to death in Ireland, and wrote privately to that effect to the Lord Lieutenant, Sir Robert Peel remonstrated with him strongly, not merely on the impolicy of his action in the particular case, but because he had acted without the advice of a responsible Minister ⁴.

And this responsibility is clearly understood and accepted by Ministers. When, in 1834, Sir Robert Peel accepted office in succession to Lord Melbourne, he believed, erroneously, that Melbourne had been dismissed by the king, and he recognized that by taking office, he had made the dismissal his own act. 'I should,' he says, 'by my acceptance of the office of First Minister, become *technically, if not morally*, responsible for the dissolution of the preceding Government, though I had not the remotest concern in it ⁵.'

¹ Bolingbroke Letters, 26 Dec. 1710-23 Oct. 1711.

² Staphylton, George Canning and his times, 433.

³ Martin, Life of the Prince Consort, iv. 32.

⁴ Wellington Despatches, Civil S. vi. 313, 319.

⁵ Sir Robert Peel's Memoirs, ii. 31.

§ 4. *The Crown and its Ministers in Action.*

So far we have dealt with the practical irresponsibility of the King. If the policy of the Government is shortsighted or disastrous, if negotiations with a foreign power break down, or if the prerogative of mercy is unwisely exerted, no one can attribute blame to the Sovereign.

Legal irresponsibility;

The legal irresponsibility as distinct from the moral or practical irresponsibility of the Crown must be taken to mean that the Sovereign is as free from responsibility in action as he is in the conception of the policy which results in action. This legal irresponsibility, which finds expression in the maxim 'the King can do no wrong,' does not mean that the King is above the law, but that the law presumes that he would never willingly infringe its provisions. The result is a curious instance of conflicting practice and theory. The Sovereign is a party to every important act of State. He opens and prorogues, summons and dissolves Parliament; appoints to all the great executive, judicial, and spiritual offices; makes peace, war, and treaties; confers dignities, grants charters, authorizes the spending of public money, sets in motion the judicial circuits. For every act which the King must do in respect of these functions he is legally irresponsible. This rule would seem to free him from all restraint; in fact it results in a strict limitation of the royal power. For some one must be responsible: and the servants of the Crown are liable as well for advice given as for acts done. They suffer by loss of place and power for unwise advice; they may suffer at the hands of the law for unlawful acts. So this combination of irresponsibility in the King and responsibility in his Ministers has a curious effect in crippling his independent action.

how it acts as a check on the King.

(a) Reluctance to act for an irresponsible master.

For, firstly, since the King is not legally liable for his actions, subordinates, who are liable, may feel a reasonable reluctance to obey, in matters of doubtful legality, the com-

mands of a master to whom the maxim *respondet superior* does not apply.

Secondly, the King's command is no excuse for a wrongful act. For a civil wrong or crime the person acting upon such command would be amenable to the ordinary Courts of law. Nor does the fact that he was a Minister of the Crown or an officer of a department of Government remove him from the jurisdiction of the Courts. Our constitution has never recognized any distinction between those citizens who are and those who are not officers of the State in respect of the law which governs their conduct or the jurisdiction which deals with them¹. To proceedings for a wrong or a crime it is no answer that the offence was committed at the request of another. In the case of such offences against the State as have led to impeachment by the Commons at the bar of the Lords, neither the King's command nor a pardon, however formally expressed, will furnish a defence at the bar of the House of Lords. In the ordinary course of law the Crown can grant no pardon for a civil wrong whereby an individual has suffered, and if he pardon a crime or an offence of a public nature the prerogative of mercy must be exercised through a responsible Minister.

(b) King's command no excuse.

Thirdly, custom or Statute requires that most executive acts to which the Sovereign is of necessity a party should be done in certain forms, or authenticated by certain signatures or seals. It will be well to consider these forms.

(c) Formality in expressing royal will.

It may be said at once that there is hardly anything which the Sovereign can do without the intervention of written forms, and nothing for which a Minister is not responsible.

Informal personal acts.

Ministers enter the service of the Crown by kissing the Queen's hands, but there are formalities which attend the assumption of all offices, the delivery of seals, a key, or a staff, the execution of a document involving the use of the sign manual and counter-signature of one or more

¹ Dicey, *Law of the Constitution*, ed. 3, ch. 12.

Ministers¹, in some cases the employment of the Great Seal². The President of the Council is appointed by simple declaration, and members of the Privy Council are admitted without form on kissing the Queen's hands and taking the Privy Councillor's oath, but these things are done at a meeting of the Council³.

The great political offices are held during pleasure, and the Queen might no doubt send for a Secretary of State and desire him to deliver up the Seals, or for the book of the Privy Council and strike out the name of a Councillor.

The Queen might also, while Parliament was sitting, enter the House of Lords, take her place on the throne, desire the House of Commons to be summoned to the bar of the House, and then and there dissolve or prorogue Parliament. These acts would be operative, but a Minister would be held responsible, and the difficulty of finding Ministers who would assume responsibility furnishes a practical check on a capricious use of the prerogative.

Depart-
mental
procedure.

We may therefore dismiss from consideration these informal acts, and we may next dismiss those orders more or less formal which proceed from the judicial or administrative departments of government, and the acts done by such departments, in virtue of a delegated authority from the Crown, often regulated by Statute.

Formal ex-
pressions
of royal
will.

There remain numerous acts of State to which the Sovereign is an immediate party, varying greatly in their importance, from a proclamation for the summons of a Parliament or the ratification of a treaty, to a licence for a theatre. These formal expressions of the royal will are made in various forms and on the responsibility of various persons.

¹ The first Commissioner of Works is appointed by sign manual warrant countersigned by two Lords of the Treasury.

² The Postmaster-General is appointed, and the Commissions of the Treasury and Admiralty constituted, by Letters Patent under the Great Seal.

³ An extract from Lord Idlesleigh's diary gives a lively description of the formalities of taking office: see *Life of Lord Idlesleigh*, by Andrew Lang, vol. i. p. 262.

Forms for the Expression of the Royal Pleasure.

The Queen's pleasure is expressed for administrative purposes in one of three ways :—

Instruments
of ex-
pression.

1. By order in Council.

2. By order, commission, or warrant under the sign manual.

3. By Proclamations, Writs, Letters Patent, or other documents under the Great Seal.

(1) An Order in Council is, practically, a resolution passed by the Queen in Council, communicated by publication or otherwise to those whom it may concern. It runs thus :—

(1) Order
in Council.

At the Court at ———, the 10th day of February, 1891.

Present,—

The Queen's most excellent Majesty in Council.

Her Majesty, by and with the advice of her Privy Council, doth order and it is hereby ordered . . .

Then the substance of the order follows.

A royal Proclamation is a formal announcement of an executive act, such as a dissolution or summons to Parliament, a declaration of war or peace, the enforcement of the provisions of a statute the operation of which is left to the discretion of the Crown in Council. The act is a resolution of the Queen in Council, but the document by which it is promulgated passes under the Great Seal¹.

Proclama-
tion.

(2) Passing on to those documents which do not proceed from the Privy Council, but from the department of a responsible Minister or Ministers, we find that they consist of sign manual warrants, commissions and royal orders.

A sign manual warrant may be an executive act, or may be merely an authority for affixing the Great Seal.

(2) Sign
manual
warrant,

Under the first head fall appointments to various offices. For instance, in the case of stipendiary magistrates the sign manual warrant is countersigned by the Home Secretary: in the case of the Paymaster-General, the First Commissioner

as an ex-
ecutive act,

¹ I have set forth the form of a Proclamation in vol. i. ch. iv. § 4.

of Works, and the Commissioner of Woods and Forests, the warrant is countersigned by two Lords of the Treasury.

Under the same head falls the exercise of various statutory powers by the Crown; as for instance the abolition of purchase in the army by royal warrant, when the Queen acted under the provisions of 49 Geo. III, c. 126: or the exercise of the prerogative of pardon, in this form, as provided by 5 Geo. IV, c. 84.

as author-
ity for
affixing
Seal.

But a very frequent use of the sign manual warrant is to authorize the affixing of the Great Seal to Letters Patent. The document, as transmitted by the Crown office through a responsible Minister to the Queen, then consists of three parts, the authority for affixing the seal, the patent, to which the seal is to be affixed, and the docket.

The *docket*¹ is a short note for the information of the Queen of the purport of the Letters Patent, and the name of the Secretary of State, by whose order they are prepared. It runs thus:—

May it please your most excellent Majesty.

This contains a warrant to the Lord High Chancellor to pass letters patent, [the object is here shortly stated.]

And this warrant is prepared according to your Majesty's command, signified by Mr. Secretary —.

J. M. Clerk of the Crown.

Royal
order.

A royal order under the sign manual, as distinct from a sign manual warrant, seems to occur only in the case of an order for the expenditure of public money, as appropriated for the service of the year. It has taken the place of a number of sealings and warrants which were once required².

Com-
mission.

An appointment to office by *commission* where the commission is not conferred by Letters Patent under the Great

¹ There is another sort of docket, which is a separate instrument, accompanying all Letters Patent and descriptive of their tenour. It is not sent to the Queen, but is stamped as required by the Stamp Act (54 & 55 Vict. c. 39), and is kept by the sealer as an authority for sealing. For forms of letters patent and sign manual warrant, see Appendix i.

² 29 & 30 Vict. c. 39, s. 4. For the old practice, see ch. vi. sect. ii. § 2; for the form of such an order see Appendix iii.

Seal, differs but little from an appointment by sign manual warrant. The Viceroy of India is appointed by *warrant* under the sign manual, the governor of a colony by *commission* under the sign manual and *signet*; the first appointment of an officer in the army is by *commission* under the sign manual and the second secretarial seal.

(3) The documents to which the Great Seal is affixed are Proclamations, Writs, Letters Patent, and the documents which give power to sign and ratify treaties. (3) Instruments under Great Seal.

A *Proclamation* as described above is an announcement of some matter which the Queen in Council desires to make generally known to her subjects. Proclamations.

A *Writ* is a mandate addressed by the executive to an individual requiring him to do, or forbear from doing, some act. The great majority of writs issue from the High Court of Justice, or from inferior Courts, in virtue of the delegated judicial power of the Crown. But certain writs pass the Great Seal, and are a more direct expression of the royal will; such are writs for the election of members, addressed to the returning officers of boroughs and counties, and writs of summons to individual peers¹. Writs.

Letters Patent are an open document to which the Great Seal is affixed; such a document is used for various purposes. It may be used to put into *Commission* powers of various sorts inherent in the Crown—legislative powers, as when the Queen entrusts to others the opening of Parliament, or the duty of assenting to Bills; judicial powers, as when the judges are sent upon circuit, to clear the gaols, to hear and determine felonies and the like, or to take assizes; executive powers, as when the duties of Treasurer and Lord High Admiral are assigned to commissioners of the Treasury and Admiralty. It is used to constitute a corporate body by charter, to confer offices, as judgeships of the High Court, or professorships of Civil Law or Divinity at Oxford, or places in the College of Letters Patent.

¹ For many purposes the Crown Office Act, 1877, enables a wafer impression of the Great Seal to be used.

Arms, or to confer dignities as for the creation of peers; or to pardon one charged with crime who is required as a witness for the Crown. It is used to grant to a Dean and Chapter a licence to elect a bishop, or to Convocation a licence to confer for the purpose of amending or altering canons¹.

Treaties.

For the purpose of making a treaty, the first stage in the proceedings is the grant of powers to representatives of the Crown to negotiate and conclude the treaty. For this purpose an instrument is prepared containing a full power to the Minister representing the Crown to negotiate or conclude a treaty, or convention, with the Minister who is invested with similar powers to act for the State, which is the other party to the transaction. To this instrument the Great Seal is affixed on the authority of a sign manual warrant countersigned by the Secretary of State for Foreign Affairs.

Powers.

Signature and sealing.

When a treaty is concluded it is signed and sealed in duplicate by the Ministers representing their respective countries with their own seals. If the treaty contains, as is usual, a clause providing that it shall be ratified and ratifications exchanged at some future date and specified place, then until ratification neither side is bound by it. If there is no such clause, the treaty may take effect in accordance with the terms therein contained². The power to ratify or reject is vested in different parts of the Sovereign power, according to the constitution of different countries, in a popular assembly, as the Cortes in Portugal; in a second chamber, as the Senate in the United States; in the Executive, as the Crown in England.

Ratification.

And so a warrant is again issued under the sign manual, countersigned by the Secretary of State, for affixing the Great

¹ It should be borne in mind that in the case of appointments to offices the Minister responsible for the appointment ascertains the Queen's pleasure before the preparation of the more formal documents which I have described. The name of the person to be appointed is submitted in writing, which if approved is initialed by the Queen.

² For the usages as to ratification, the distinction between tacit and express ratification, and the moral obligation not arbitrarily to refuse to ratify, see Hall, *International Law*, ed. 3, pp. 329-334.

Seal to an instrument ratifying the treaty. The instrument of ratification, which is in fact the treaty with the Great Seal affixed to it, is then exchanged, by the Minister empowered to do so, for a ratification with corresponding forms from the other side. The Ministers who exchange ratifications execute at the same time in duplicate a document of a less formal but very important character, a statement, sealed with their respective seals, that the ratifications have been exchanged. The document of ratification of the treaty by the foreign power with whom we are dealing, and the document attesting the fact that ratifications have been exchanged, are then deposited in the Foreign Office.

It is possible that a treaty may require legislation in order to bring it into effect. Such is the case with treaties involving fiscal changes which cannot be brought about without the consent of Parliament. The ratification is then postponed till the required legislation has taken place, or the treaty must contain, express or implied, a condition subsequent that its operation is dependent on the action of Parliament.

Persons responsible for the Expression of the Royal Pleasure.

The order in Council is made by the Queen 'by and with Privy Councilors. the advice of her Privy Council.' Those persons who are present at the meeting of the Council at which the order was made assume the responsibility for what was done.

The sign manual warrant or other document to which the sign manual is affixed bears the counter-signature of one or Responsible Ministers. more responsible ministers. In case of Instructions given to a colonial governor, where no such counter-signature appears, the document is authenticated by the use of the Signet, one of the three seals for the use of which a Secretary of State is responsible.

The Great Seal is affixed on the responsibility of the The Chancellor. Chancellor, but though he is primarily responsible there are in most cases certain forms by which he is authorized or directed to use this final authentic expression of the royal will.

Ancient
modes of
giving
authority.

These forms were, until lately, very complicated; they were due to the conflict between kings and their advisers in the fourteenth and fifteenth centuries. The King wished to order the use of the Great Seal without the intervention of any Minister but the Chancellor; the Council and the Parliament were determined that at least one other officer of State, the keeper of the Privy Seal, should be a party to the transaction¹.

An Act of 1535² settled the forms necessary for the most important purposes in which the Great Seal needed to be employed. Every gift, grant, or writing signed with the sign manual and intended to pass under any of the great Seals³, was to be brought to the King's Principal Secretary or to one of the clerks of the Signet; a warrant under the Signet was then to accompany the document to the Lord Keeper of the Privy Seal, who in turn transmitted it with a like warrant under the Privy Seal to the Chancellor or other officer, in order that effect might be given in due form to the King's pleasure as expressed in 'gift, grant, or writing.' At some date subsequent to 1689 the Law Officers of the Crown were introduced into the transaction at its earliest stage. Legislation of the present reign has reduced these forms to reasonable limits⁴.

¹ Proceedings of the Privy Council, vol. vi., Preface, pp. clxxxiv, clxxxviii, cxcii, cxvi.

² 27 Hen. VIII, c. 11.

³ There were Great Seals for England, Ireland, the Duchy of Lancaster, the Counties Palatine of Durham and Chester and the Principality of Wales.

⁴ Before 1851 a patent under the authority of a Secretary of State might pass through the following forms:—

1. Warrant, signed by King and countersigned by Secretary of State to Attorney- or Solicitor-General to prepare a *Bill*.
2. Bill prepared, signed by Attorney-General and taken to Secretary of State's office for the King's signature. There called the Attorney-General's Bill.
3. Bill signed by the King, taken to Signet Office, there called the King's Bill, and there deposited.
4. An attested transcript sealed with Signet, handed on to Lord Privy Seal's Office, bidding him direct Chancellor to make Letters Patent in prescribed form, taken to Privy Seal Office, and there deposited.
5. An attested transcript of the above, sealed with Privy Seal, with

We can therefore consider, within these limits, the modes Existing
in which authority is given for affixing the Great Seal. modes of
giving
authority.

They are four :—

A *fiat* of the Chancellor or Attorney-General, or warrant of the Speaker of the House of Commons.

An Order in Council.

A sign manual warrant¹.

A sign manual warrant preceded by an Order in Council.

For certain purposes the Chancellor may order the use of the Seal without any previous signification of the Queen's pleasure. This is done in the case of some of the Commissions for holding circuits in England and Wales², of Commissions of the Peace, of writs of summons to peers to attend Parliament on succeeding to the Peerage, of writs of *dedimus*, *supersedeas*, *mittimus*³. Chancellor's fiat.

request for direction was lodged at Crown or Patent Office in Chancery. There an engrossment was made of it, and the Privy Seal and engrossment left at the Lord Chancellor's.

6. If Lord Chancellor saw no objection, he wrote his name under the grant, and the Great Seal was then affixed. (Nicolas vi. ccviii-ccx.)

The changes are as follows :—

14 & 15 Vict. c. 82. Necessity for *Signet* abolished.

43 & 44 Vict. c. 103. Attorney- and Solicitor-General not to prepare warrants for Letters Patent.

47 & 48 Vict. c. 30. Necessity for *Privy Seal* abolished; and a warrant under H.M. sign manual, prepared by the Clerk of the Crown, countersigned by Lord Chancellor, one of the principal Secretaries of State, the Lord High Treasurer, or two of the Commissioners of the Treasury, is authority for affixing the Great Seal.

This is not to affect cases where the fiat, authority, or direction of Chancellor is sufficient.

¹ In the case of Letters Patent empowering Commissioners to open Parliament, or to give the royal assent to Bills, the sign manual warrant is a part of the document, or rather, the Queen's signature, as well as the Great Seal, is affixed to the Letters Patent. This is under 33 Hen. VIII, c. 21, s. 5.

² This is true of the autumn assizes, and of the intermediate assize after Easter in Lancashire and Yorkshire. For the purpose of other circuits, the Queen signs two warrants, one to assign the judges to their respective circuits, the other containing the names of the Queen's counsel and of others who are to be put into the Commission.

³ Writ of *dedimus* giving power to administer oaths—as in the case of persons newly placed on the Commission of the Peace.

Of *supersedeas* to stay the exercise of a jurisdiction.

Of *mittimus* to authorize the removal of records from one Court to another.

Speaker's warrant. Writs for bye-elections to fill vacancies in the House of Commons are issued from the Crown Office on the authority of a warrant from the Speaker, Commissions of Escheat on the *fiat* of the Attorney-General.

Order in Council. In certain cases the authority of an Order in Council is sufficient. A royal proclamation passes the Great Seal in virtue of such an order, and though writs for a new Parliament are in practice issued on the authority of the proclamation for the summons of a Parliament, an Order in Council is usually made, directing the Chancellors of England and Ireland to issue the necessary writs.

Sign manual warrant. In the great majority of cases the mode in which the authority is given is by a sign manual warrant countersigned by one of the principal Secretaries of State when Letters Patent are used to signify the royal pleasure, or when powers are given to conclude or ratify a treaty. On certain occasions the Lord Chancellor countersigns the warrant. The Lords of the Treasury might do so, but do not in practice.

Order in Council and warrant. In a few cases an Order in Council is required to precede the issue of the sign manual warrant. These occur in the grant of charters to towns or other corporate bodies, and also in certain cases when the warrant proceeds from the Colonial Office. For the Privy Council advises the Crown before a corporation is created and invested with privileges, and a colony, in default of any other provision for its government, is governed by the Crown in Council.

It will be understood that although an Order in Council or a sign manual warrant, or both, may for certain purposes be required as authority for affixing the Great Seal, yet that all three are separate modes of signifying the royal pleasure, and that in each case either a body of Privy Councillors or an individual Minister is rendered responsible for the action of the Crown.

The forms above stated seem to comprise all the modes in which the royal will is expressed for executive purposes, and

they show how many restraints are imposed on its expression by the interposition of responsible Ministers.

Nor is any choice allowed to the Crown as to the necessity for an individual expression of consent, or as to the form in which it should be expressed if custom or rules of law require that the assent should be given in a particular form. Necessity for observance of forms.

In cases of illness or of absence from the kingdom, the use of the sign manual has been dispensed with. A stamp has been allowed to be affixed under certain conditions when Exemptions. (1) Illness. a King or Queen has, from weakness or pain, been unable to sign in person; and a Commission has from time to time been issued under the Great Seal to enable Lords Justices to sign on behalf of the King when he has been absent from the kingdom. (2) Absence from kingdom.

Modern facilities of communication have made the appointment of Lords Justices unnecessary. The last four reigns have produced but one such Commission, in 1821. And the number of cases in which the sign manual is now required by Statute seems in the course of the present century to have made Parliament more scrupulous as to the delegation of this royal function.

Henry VIII, Mary Tudor, and, it is said, William III, issued Commissions giving power to certain persons to apply a stamp of a certain form to such documents as should pass the sign manual.

In the last weeks of the life of George IV his infirmities Statutory exemption.

¹ The following is the form in which that part of the Commission runs which gives authority to sign for the King. It is taken from the Commission of 1719.

‘And our Will and Pleasure is, that the said William Archbishop of Canterbury, &c., by virtue of the authority granted by these presents, be, and shall be known, named and called by the name, Title, or Stile of Guardians and Justices of our said Kingdom, or our Lieutenants in the same; and that all Writs, Letters Patent, Commissions and other instruments or writings whatsoever, which should or ought to have or bear Teste by or under ourselves, shall bear Teste in and under the name of the First for the time being and the Stile of other Guardians and Justices of our said Kingdom, and of our Lieutenants in the same, in the form following, viz.: Witnesses, William Archbishop of Canterbury and other Guardians and Justices of the Kingdom. 44 Com. Journals, p. 40.

made it difficult and painful for him to affix his signature to documents for which the sign manual was necessary. It was then considered that neither the King of his own authority, nor the King in Council, could make valid the expression of the royal will in any other way than by actual signature, and so a Statute¹ had to be passed providing that a stamp might be affixed in lieu of the sign manual; but the King was required to express his consent to each separate use of the stamp², and the document so stamped was attested by a confidential servant and a number of high Officers of State.

In illness
of George
IV.

In case of
military
com-
mis-
sions.

Again, until 1862, it was the practice that all commissions in the army should pass under the royal sign manual. The accumulation of commissions awaiting signature had reached 15,000. An Act was passed to enable the Queen, by Order in Council, to free herself from the duty of signing such commissions. It was argued in debate, on the authority of the precedent of Mary's reign, and of the commissions to the Lords Justices in the reigns of George I and George II, that the Queen could by virtue of her prerogative depute others to sign for her; but Sir G. C. Lewis pointed out that commissions had always passed the sign manual, that this practice had been recognized by various Statutes, including that of George IV just referred to, and that it could not safely be abandoned except on statutory authority³.

Summary. Enough has been said to show the limitations which law and custom have laid upon the exercise by the Crown of its

¹ 11 Geo. IV, c. 23.

² Stanhope, *Conversations with the Duke of Wellington*, p. 257:—

'The King was rather irritable from the effect of a clause which Lord Grey had introduced into the Bill for the Stamp, that his assent should be spoken separately to each paper requiring signature. Keppel, who was always about him, was very careful as to the due observance of this rule; once or twice, when the King had only nodded, instead of repeating the same words, Keppel reminded the Duke, and the Duke then reminded the King. His Majesty said, with some impatience, "Damn it! what can it signify?" But the Duke answered, "Only, Sir, that the law requires it;" upon which he complied.'

³ Hansard, clxv. 1483.

executive powers, whether those powers are used in the choice of Ministers, the determination of policy, or the doing of acts of State.

In theory the Crown chooses its Ministers; in practice the wishes of the country, of the House of Commons, of the party leader to whom the formation of a Ministry is entrusted, greatly limit the royal choice. In theory the Crown does every important act of executive government; in practice every such act must be done in conjunction with a Minister responsible for the act and its consequences, and must be done in such a way as to ensure that this responsibility is real.

And yet although the discretionary exercise of its legal powers has passed out of the hands of the Crown, though it has become the instrument through which its Ministers give effect to the policy which they believe to be approved by the country, the real influence of the holder of the Crown is not to be estimated by its legal or its actual powers as the executive of the State. The King or Queen for the time being is not a mere piece of mechanism, but a human being carefully trained under circumstances which afford exceptional chances of learning the business of politics. Such a personage cannot be treated or regarded as a mere instrument: it is evident that on all matters of State, especially on matters which concern the relations of our own with other States, he receives full information, and is enabled to express if not to enforce an opinion¹. And this opinion may, in the course of a long reign, become a thing of great weight and value. It is impossible to be constantly consulted and concerned for years together in matters of great moment without acquiring experience, if not wisdom. Ministers come and go, and the policy of one group of Ministers may not be the policy of the next, but all

¹ Illustrations of this statement are furnished by the memorandum communicated at the Queen's desire to Lord Palmerston in 1851, post, ch. iii. sect. iii. § 3 (p. 135): and by the correspondence which passed between the Queen and Archbishop Tait in 1869 as to the action of the House of Lords in respect of the Bill for the Disestablishment of the Irish Church. (Davidson, *Life of Archbishop Tait*, vol. ii. ch. xix.)

Ministers in turn must explain their policy to the Executive Sovereign, must effect it through his instrumentality, must leave upon his mind such a recollection of its method and of its results, as may be used to inform and influence the action of their successors. It is true that our Kings and Queens can no longer exercise at their pleasure the executive powers of the State, nor enjoy a perfectly free choice of the Ministers who are to exercise those powers. They still remain the instrument without whose intervention Ministers cannot act; they still remain advisers who have enjoyed unusual opportunities for acquiring the knowledge which makes advice valuable, who may be possessed of more than ordinary experience, whose warnings must be listened to with more than ordinary courtesy.

CHAPTER II.

THE TITLE TO THE CROWN AND THE RELATION OF SOVEREIGN AND SUBJECT.

§ 1. *The History of the Title to the Crown.*

THE title to the Crown of this country has been a very simple matter for a long time past, owing to the constitution of a Parliamentary entail by the Act of Settlement, and to the fact that the royal line has never failed since the House of Brunswick succeeded under the provisions of that Act.

But inasmuch as disputed titles have played a large part in our history, and since the forms of the coronation recall the elements which went to make up the title to the Crown, it is worth while to review the history of the matter.

The Saxon King was the elect of the Witan, but, as in many other cases of seemingly free choice, the Witan were practically bound by conventions to choose from within a narrow circle. Outside the royal family they did not go, till conquest put constraint upon them, and Canute was chosen King. But within the royal family they were not limited by the modern rules of hereditary succession. Thus the title was made up of various elements. Birth went for something; the election by the Witan gave the legal sanction to a claim which could never have been made if the elected had not been born in the royal line; the ceremony of coronation backed the election with the support of the Church, and

Title by
election.

the oath of fidelity sworn by the nobles gave substantial force to hereditary, legal, and religious claims. From the time that Canute's line failed no King reigned who could show a good hereditary right till Henry II. Edward the Confessor was the eldest surviving son of Ethelred, but the son of his elder brother, Edmund Ironside, was still living. Harold's connection with the house of Cerdic was remote if not imaginary, and here again Edgar, the grandson of Edmund, was the heir. William I claimed partly as next of kin, which was absurd, for he was a bastard: partly under the recommendation of Edward the Confessor, who certainly had not acquired any right to the regard of the English people. But each of these Kings established a good legal title in election by the Witan, a title which was valid enough so long as the holder had physical force at his command to maintain it. The first four Norman Kings, whatever their claims may have been apart from election, showed the utmost respect for an election by that body which corresponded to the Witan, the Commune Concilium.

Title by
inheritance.

Gradually the notion of hereditary right grew stronger. This arose in part because the feudal land law, resting on the territorial character of kingship, assimilated the descent of the Crown to the descent of an estate in fee simple. Hence it is that so many medieval wars and dynastic quarrels bear so strong a resemblance to litigation of that tedious sort in which pedigrees are in question. In the endeavour to show that might is right the learning and arts of the conveyancer are called into play.

Causes
of its acceptance.

And the rule of hereditary succession received readier acceptance in the more settled state of society. The fact that the Witan or Commune Concilium passed over the infant children of a deceased King in favour of a more vigorous member of the royal house, showed that besides hereditary right, popular election, and religious ceremonial, a strong arm was needed to maintain the right they conferred. The succession of Henry III and Richard II, especially the latter,

who had uncles living of full age and experience in affairs, shows that society so far recognizes legal right as to make an invasion of that legal right a difficult matter for an aggressor.

Meantime the title of our earlier Kings rested less upon Election. such hereditary right as they might be able to assert, as in the solemnity of election and coronation. The election by Witan or Great Council of the realm gave the preliminary right to demand that the subsequent stages of the ceremonial which perfected the title should be gone through.

The coronation, which gave religious sanction to the title by election, contained also the formal compact between King and people that the King should govern well, and that the people should obey. The King's promise made by oath or charter, or both, was to keep Church and people in peace, to forbid wrong and rapine in all degrees of men, and to do justice with mercy: the people by acclamation and the great men by oath promised him their fealty and allegiance, and the coronation service invested the title of the new King with the sanctity of divine approval.

That these ceremonials were no mere form is plain from the fact that there was a real interregnum between the death of one King and the election and coronation of another; that until the new King was crowned the King's peace was in abeyance; the maintenance of order might well be in jeopardy, while the State had no one to represent it for the purpose of enforcing the peace¹.

The interregnum.

Its inconvenience.

As the conception of hereditary right strengthened, the importance of the election and coronation dwindled, and the practical inconvenience of the interregnum was curtailed.

The reign of Edward I began before his coronation. He was absent in Palestine when his father died. Four days after

How obviated.

¹ Before the accession of Edward I the peace had been maintained by the justiciar during the interval preceding the coronation of the new King (Stubbs, *Select Charters*, 446): and hereditary right so far came in aid of the maintenance of the peace, that the prospective King claimed to be *lord* of England, and to enjoin the peace in that capacity. Pollock and Maitland, *Hist. of English Law*, i. 507.

his father's death the Barons swore fealty to him in his absence, and three days later the royal Council put forth a proclamation in his name, announcing that he reigned by hereditary right and the will of the magnates, and that he enjoined the peace. The formal coronation did not take place for nearly two years. Edward II dated his reign from the day after his father's death. Edward III proclaimed the peace before he was crowned¹, but he had been declared and accepted as guardian of the realm before his father's deposition, and in that capacity would be entitled to maintain the peace.

Depositions and Parliamentary title.

The depositions of Edward II and Richard II bring Parliament into the place occupied by the Witan and the Commune Concilium. The popular acclamation necessarily sinks into a mere form when the representatives of the Commons in Parliament become parties to the choice of a King. The accession of Henry IV. is the best illustration of all the safeguards by which a medieval King could fence about his title to the throne. He was not satisfied with his election by the estates of the realm, with the resignation by Richard II of the fealty and allegiance of his barons, and the transfer of that fealty to himself. He claimed the Crown as descended from Henry III, reviving thus a tradition that Edmund Crouchback, the second son of Henry III, was really the elder. His title thus based on election, on feudal recognition by the vassals of the Crown, on alleged hereditary right, was further confirmed by Parliament, and the Crown entailed by Statute on him and the heirs of his body. But hereditary right, supported by force, broke through these carefully constructed defences.

Edward IV.

Edward IV was proclaimed King as soon as he had successfully asserted his title by force and arms. His right to be proclaimed King was based not on election by estates of the realm, nor upon fealty sworn by the magnates, nor upon the formalities of the coronation. It was a mere question of

¹ Stubbs, Const. Hist. ii. 360, 368.

pedigree. Edward IV was the nearest male representative of the eldest surviving line of Edward III, and on that ground he claimed to set aside not only the proceedings, regular otherwise and valid, which had placed Henry VI on the throne, but the Act of Parliament which had entailed the Crown upon the line of Henry IV. Title by inheritance.

From this time forth our history illustrates the conflict between two views of kingship, the one based on title by Parliamentary choice, the other on title by inheritance. The old forms of election give way to Parliamentary title.

Henry VII claimed the Crown by hereditary right, but gave his assent to a Bill which settled the Crown on himself and the heirs of his body. Henry VIII obtained from Parliament a power to dispose of the Crown by will, and devised it, failing issue of Edward, Mary or Elizabeth, to the grandchildren of his younger sister¹, thus disinheriting his elder sister Margaret and her issue. But when James, the great-grandson of Margaret, succeeded to Elizabeth in spite of the Parliamentary entail created by the will of Henry VIII, he claimed to reign by hereditary right, and Parliament, Combina-
tion of
titles. a Jac. I, though it fortified his title by an Act of Recognition, recited c. 1. in the Act that he was entitled to reign by descent.

Title by descent, and title by choice of Parliament, came to express two different views of kingship. But the force of either ground of claim was always recognized. The King who claimed by hereditary right fortified his title by an Act of Parliament. The King who rested his title on an Act of Parliament recited in it his hereditary claims. The theory of hereditary right had in the middle ages possessed this advantage, that it dispensed with the interregnum which had prevailed when the title of the new King depended on his election. When feudalism broke up, and the feudal bond ceased to furnish the ground of political obligation, hereditary right supplied the want, and was enhanced with divine sanction. Throughout the seventeenth century it was main- They represent two views of kingship.

¹ Bailey, Succession to the English Crown, p. 135.

tained by the opponents of popular rights, not only that the throne was never vacant and that the feudal rules of succession at once indicated an heir, but that the heir reigned by divine right, and that resistance to his rule or recognition of any other title was not merely unlawful but sinful. The official representative of his people was lost sight of in the ruler chosen by God.

The procedure of 1688.

The two theories came to a practical issue in the reign of James II. James left his kingdom and his subjects to take care of themselves: during his short reign he had not merely strained his indefinite prerogative in order to do violence to the spirit of the constitution, but had again and again broken the law of the land. The Prince of Orange, on arriving in London, summoned the Peers, as many of the members of the Parliament of Charles II as were in town, and some of the citizens. By their advice he issued letters to the same effect as writs to the Lords Spiritual and Temporal, and to certain officers in counties and boroughs for the summons of a convention. The estates of the realm were thus brought together to settle the affairs of the nation. The convention was a Parliament in every respect except the form of summons, and consisted of all the persons who would have been summoned to a regular Parliament. The want of formality in the summons arose from the fact that the King had fled, and the first business of the convention was to supply the place of an official whose existence was necessary not only for the conduct of the business of government but for the legal summons of Parliament.

Difficulties of the Stuart party. Divine right.

The upholders of the divine hereditary right were placed in a difficulty. To invite James to return without conditions was impossible, but to negotiate with a divinely appointed ruler was contrary to the principles of their political faith. What was to happen if King and subjects could not come to terms? Either the subjects must resist the King's return, or they must receive him back on his own terms. A middle course was proposed—the appointment of a Regent. This involved

the assumption that James' unfortunate malady of misgovernment reduced him to the position of an infant or lunatic, and that his rights remained to him, though they must be exercised by a representative. But if the people could judge when the King's conduct justified his supersession they might as well assign the government to a new King at once, instead of to a Regent. There was also the practical difficulty, that a King *de facto* would coexist with a King *de jure*, neither of whom would acknowledge the rights of the other, while the Ministers would, in a sense, have to acknowledge both.

On the other side it was said that the relation of King and subjects had always been one of mutual obligations, that Kings had before now been deposed for misgovernment, and that James had not only committed divers acts of misgovernment and illegality, but had deserted his people and taken refuge with a foreign power.

Common sense triumphed alike over sentiment and technicality. James II was alleged in the Declaration of Rights to have 'abdicated': it was left open to the one side or the other to interpret this as a voluntary or an involuntary retirement from the throne. More important were the next words, 'the throne being thereby vacant.' It was thus declared by the assembly of the estates of the realm that the throne unlike a piece of real property, might be without an owner; that its occupant was not necessarily designated by the rules of succession to an estate in land; that the King might die in the sense that royalty might for the moment fall into abeyance; and that this might happen not through some catastrophe, which extinguished the royal line by the death of all its representatives, but by the misconduct of a King, who, having occupied the throne with an unimpeachable title, had been adjudged by his people to be unfit to reign.

When therefore it is said, as it often is said, that the prerogative of the Crown was very greatly affected by what happened in 1688 and 1689, it is well to bear in mind that the changes which then took place were either declarations of principle, or

Practical
convenience.

The
Declara-
tion of
Rights.

A re-
assertion
of ancient
rules.

changes of practice, and that of actual legal limitation there was but little. Parliament had settled the succession to the Crown before, and it settled the succession again, only since the last occasion of a Parliamentary settlement the theory of divine right had arisen in support of the hereditary claim, and the conception of a royal prerogative superior to all the rules of law had survived the catastrophe of the Rebellion.

The Settlement of 1689.

To this the action of the convention was a final answer, and an assertion that the nation could depose a King for misgovernment, could give the Crown to another, and could determine the course of succession, and further, that the Crown

Feb. 1689. could be given upon conditions. The Declaration of Rights declared that James had abdicated, that the throne was vacant. As James did not admit this, he must be regarded as having been deposed. The Crown was then offered to William and Mary, during their lives and the life of the survivor, providing that the sole and full exercise of the royal power should be only in, and executed by, the said Prince of Orange, in the names of the said Prince and Princess, during their joint lives.

Oct. 1689. By the Bill of Rights the limitations after the death of the survivor were to the heirs of the body of Mary, failing them to the heirs of the body of Anne, and failing them to the heirs of the body of William.

The Settlement of 1700.

Such was the settlement of 1689, but in the year 1700 a further limitation of the Crown had become necessary. For Mary had died, and William was dying, and Anne had survived her numerous offspring, and had reached a childless middle age. It became necessary then to look for a Protestant, of kin to the royal line, who could be brought into the succession, and the nearest so qualified was Sophia, widow of the Elector of Hanover, daughter of Elizabeth, Queen of Bohemia, the daughter of James I. The Crown, then, failing heirs of Anne and William, was settled on the heirs of the body of Sophia, and under this Parliamentary Settlement the Crown is now held.

But the right to the Crown under this Settlement is subject to conditions, for:—

- (1) Every person who is or shall be reconciled to the Church of Rome, or shall hold communion with the Church of Rome, or shall profess the Popish Religion, or shall marry a Papist¹, becomes thereby excluded from, and incapable of inheriting the Crown, the government of the realm, Ireland, and the dominions of the Crown, or any part of them: and incapable of exercising any regal power, authority, or jurisdiction in the same: the people are absolved from their allegiance; and the Crown goes to the next in succession being Protestant, as if the person who incurred the disability was dead. Conditions of the Settlement.
1 Will. & Mary, st. 2, c. 3, s. 9. Securities against a Roman Catholic king.
- (2) Every King or Queen succeeding to the throne by virtue of the Act of Settlement is to make the declaration against transubstantiation at the first day of the meeting of the first Parliament, or at the Coronation. 1 Will. & Mary, st. 2, c. 2, s. 10.
- (3) Every King or Queen shall have the Coronation Oath administered at his or her Coronation, according to the provisions of 1 Will. & Mary, c. 6. 12 & 13 Will. III, c. 2, s. 2.
- (4) Every person who shall come into possession of the Crown shall join in communion with the Church of England. Ibid. s. 3.

The Act of Union with Scotland in 1707 provided that the succession to the Crown of Great Britain should be the same as the succession provided for the Crown of England by the Act of Settlement, and a similar provision was inserted in the Act of Union with Ireland in 1800. The Union with Scotland.

The title to the Crown of the United Kingdom of Great Britain and Ireland is vested by statute in the heirs of the With Ireland.

¹ Macaulay, Hist. c. 15, comments on the vagueness of this provision. The Sovereign is subject to certain tests; no test is prescribed by which to ascertain the religious denomination of the person whom the Sovereign may marry. The words which follow as to the people being absolved from their allegiance have the same vague character; but this must needs be in attempting to make statutory provision for a revolution.

body of Princess Sophia, who is the stock of descent, whose lineal heir must be sought on each occasion of the demise of the Crown.

§ 2. *Modern Forms.*

The
accession
of the
Queen.

The forms which took place on the accession and coronation of the Queen are worth noticing, as illustrating some statements which have gone before.

William IV died on the 20th June, 1837, in the early morning, and before midday the Lords of the Privy Council and others¹ assembled at Kensington Palace to proclaim the Queen, which was done in the following form :—

The Pro-
clamation.

‘Whereas it has pleased Almighty God to call to his mercy our late Sovereign Lord King William IV of blessed and glorious memory, by whose decease the Imperial Crown of the United Kingdom of Great Britain and Ireland is solely and rightfully come to the High and Mighty Princess Alexandrina Victoria, saving the rights of any issue of his late Majesty King William IV which may be borne of his late Majesty’s Consort. We therefore, the Lords Spiritual and Temporal of this realm, being here assisted with these of his late Majesty’s Privy Council, with numbers of others principal gentlemen of quality, with the Lord Mayor, Aldermen, and Citizens of London, do now hereby with one voice and consent of tongue and heart publish and proclaim that the High and Mighty Princess Alexandrina Victoria is now by the death of our late Sovereign of happy memory become our only lawful and rightful Liege Lady Victoria, by the Grace of God Queen of the United Kingdoms of Great Britain and Ireland, Defender of the Faith, saving as aforesaid. To whom, saving as aforesaid, we do acknowledge all faith and constant obedience with all hearty and humble affection, beseeching God, by whom Kings

¹ The Lord Mayor of London is summoned to the meeting at which a new Sovereign is proclaimed, but retires immediately after. He has no rights as a Privy Councillor (Greville Memoirs, iv. 79-82). But I doubt if Greville took note of the differences in character, as apparent from the Proclamation, between the meeting at which the Queen was proclaimed and the meeting of the Privy Council held immediately after. See the London Gazette for June 29, 1837, where the names of those present are set out.

and Queens do reign, to bless the Royal Princess Victoria with long and happy years to reign over us.'

It should be noticed that the Queen was proclaimed, not by the Privy Council but by the *Lords Spiritual and Temporal, and others*. This body is something more than the Privy Council. It represents a more ancient assemblage, the Witan or *Commune Concilium* meeting to choose and proclaim the new King.

The Queen then entered the room, addressed the Council, and took and subscribed the oath for the security of the Church of Scotland, as required by the Act of Union¹. The late King's Privy Council were then sworn², and the Queen issued a proclamation continuing in their offices all who, on the death of William IV, were 'duly and lawfully possessed of or fully invested in any office, place, or employment, civil or military,' within the dominions of the Crown. On the 20th November the Queen made the declaration against transubstantiation in the presence of both Houses, as required by the Bill of Rights and Act of Settlement.

Requirements of form.

The coronation of the Queen did not take place for more than a year. The ceremonial illustrates some features of the ancient practice in a curious way³. The first portion of the ceremony after the Queen's entrance was the Recognition. The Archbishop, accompanied by the great hereditary officers of State, turning in succession to the four points of the compass, addresses the assemblage in these words:—

The Coronation.

'Sirs, I here present unto you Queen Victoria, the undoubted Queen of this realm: Wherefore all you who are come this day to do your Homage, are you willing to do the same?'

The Recognition.

The people 'signify their willingness and joy by loud and repeated acclamations, all with one voice crying out, "God save Queen Victoria"'.⁴

¹ Hansard, xxxix. 13.

² Greville Memoirs, iii. 407.

³ Form and order of the Queen's Coronation. There is a reprint of the service in Sir R. Phillimore's *Ecclesiastical Law*, ed. 2, p. 813.

⁴ The people are for this purpose represented by the boys of West-

The Oath. After some further ceremonials comes the Coronation Oath, administered by the Archbishop :—

‘Will you solemnly promise and swear to govern the people of this United Kingdom of Great Britain and Ireland, and the Dominions thereto belonging, according to the Statutes in Parliament agreed on, and the respective laws and customs of the same ?

‘I solemnly promise so to do.

‘Will you to your power cause Law and Justice, in mercy, to be executed in all your judgements ?

‘I will.

‘Will you, to the utmost of your power, maintain the Laws of God, the true profession of the Gospel, and the Protestant reformed religion established by law ? And will you maintain and preserve inviolably the Settlement of the United Church of England and Ireland, and the doctrine, worship, discipline and government thereof, as by the Law established within England and Ireland and the Territories thereunto belonging¹ ? And will you preserve unto the Bishops and Clergy of England and Ireland, and to the Churches there committed to their charge, all such rights and privileges, as by law do, or shall appertain to them, or any of them ?

‘All this I promise to do.

The
Anointing
and Hom-
age.

The Anointing follows, and, lastly, the Homage of the Peers, which, in the case of a spiritual peer, runs :—

‘I —— will be faithful and true, and Faith and Truth will bear, unto our Sovereign Lady, and your Heirs, Kings or Queens of the United Kingdom of Great Britain and Ireland. And I will do, and truly acknowledge, the Service of the Lands which I claim to hold of you, as in right of the Church. So help me God.’

And in the case of a temporal peer runs :—

‘I —— do become your Liegeman of Life and Limb, and of earthly worship, and Faith and Truth I will bear unto you to live and die against all manner of Folks. So help me God.’

minster School, who rehearse beforehand the part played by the crowd at a mediæval coronation.

¹ The disestablishment of the Irish Church by 32 & 33 Vict. c. 42, involves the omission of this clause and the substitution of the words ‘this realm’ for ‘England and Ireland’ in the clause next ensuing.

Of the four portions of the ceremonial to which I have called attention each seems to possess a special historical interest. The Recognition represents the great officers of the Witan or Council presenting the Sovereign of their choice to the assembled people, who are asked to record the national approval of the chosen King.

The Coronation Oath indicates the contractual character of English Sovereignty, a character which was common as well to the official chief of Saxon times as to the territorial lord of feudalism. The form survived the high prerogative days of the Tudors and Stuarts and the theory of Divine Right. The wording of the oath was settled immediately after the Revolution¹. Its substance—to keep the Church and all Christian people in peace—to restrain rapine and wrong—to temper justice with mercy—is as old as Egbert². Survival of old requirements.

The Anointing is that which would seem to confer upon royalty its sacred character, and to give the sanction of the Church to the choice of the people.

The Homage of the Peers represents the taking of the oath of fidelity by the *Ministri* of Saxon times, later by the great vassals of the Crown, which gave practical security to the new reign.

The counterpart to the Coronation Oath is the Oath of Allegiance, which represents the undertaking of the subject to be loyal in return for the promise of the Sovereign to govern well; but of this presently.

§ 3. *Allegiance.*

We may now pass to the relation of Sovereign and subject. The subject owes allegiance to the Sovereign, as the Sovereign owes good government to the subject. The Sovereign is required to promise this in the Coronation Oath, but the subject is not, except for certain purposes, required to take the Oath of Allegiance. The Oath of Allegiance.

The form of this is now settled by 31 & 32 Vict. c. 72 :

¹ 1 Will. & Mary, st. 1, c. 6.

² Stubbs' Select Charters, p. 62.

an affirmation to the same effect may be made under the Oaths Act, 1888¹. But allegiance is due whether oath or declaration of allegiance has or has not been taken or made : and it is due from resident aliens, as well as from citizens ; in the first it is *local*, in the second it is *natural* allegiance. It was once, no doubt, a personal tie, binding two individuals by mutual assurances of fidelity and protection ; it is now a test of citizenship, a mode of ascertaining to what country a man belongs.

Nature of
Allegi-
ance.

Allegiance or liege homage differs from homage and from fealty. Fealty is the simple undertaking to be faithful, an undertaking fortified by an oath. Homage is the undertaking to be faithful in respect of land, binding the vassal to the lord of whom he holds lands. Allegiance is the duty, which every man owed, to be faithful to the head of the nation, land or no land. But, as the King was supreme landowner and judge, the ideas of homage and fealty were merged in allegiance.

Test of
nation-
ality.

The territorial character of feudal sovereignty made a man's allegiance depend, not on his own parentage, but on the place of his birth. A Frenchman, born in the dominions of the Crown, could not escape the liabilities, nor could a man born of English parents abroad acquire the rights, of an English citizen. *Nemo potest emere patriam*.

But a man may be a citizen of two countries if both are in allegiance to the same King. *Calvin's*² case decided that Scotchmen born after James I succeeded to the English Crown were born in the allegiance of the King of England, and were consequently citizens of England as well as Scotland, and in like manner the English *post nati* were citizens of Scotland, as well as England. But if the Crowns are severed each man is limited to his original allegiance. Hanoverians born while William IV was king of Hanover were citizens of the United Kingdom, but they became aliens upon the succession of Queen Victoria³.

The Common Law rule on the subject is clear. A person

¹ 51 & 52 Vict. c. 46.

² St. Tr. 559 (e).

³ Stepney Election Petition, 17 Q. B. D. 54.

born in the dominions of the Queen is a natural born British subject; a person born beyond the limits of the Queen's dominions is an alien. A man might be made a citizen by statute, or a denizen by prerogative, but the Act of Settlement forbad such a person from holding office or a place in the Privy Council or either House of Parliament, or receiving lands from the Crown. But statute has engrafted on these rules the following exceptions.

1. A person born abroad whose father was a natural born British subject¹, and the son of a person so born abroad², are to all intents and for all purposes natural born British subjects, always assuming that the father up to the date of birth has done nothing to divest himself of his British nationality.

But this statutory exemption is construed strictly. If a natural born British subject settles in France, his son and his grandson (assuming the family to continue to reside in France) are natural born British subjects. But his great-grandson is an alien³.

2. An alien may obtain a certificate of naturalization under the Naturalization Act, 1870, after five years' residence in England, and may then acquire all the political and other rights and obligations of a natural born British subject⁴. He need not lose his earlier nationality, but then he will not be deemed to be a British subject when he is within the limits of the state whose citizenship he retains.

3. If the person who has obtained such a certificate of naturalization be the father or widowed mother of a child, who at the date of the certificate is an infant, and who becomes resident with the father or mother in the United Kingdom, such a child becomes a naturalized British subject⁵.

But here again the statutory exemption must be construed strictly. The child of a naturalized alien, if of full age at the date of the naturalization, is unaffected by it. If born abroad after the naturalization he would seem not to come under the

¹ 7 Anne, c. 5, s. 3; 4 Geo. II, c. 21, s. 1.

² 13 Geo. III, c. 21.

³ De Geer v. Stone, 22 Ch. Div. 243.

⁴ 33 & 34 Vict. c. 14, s. 7.

⁵ Ibid. ss. 4, 10.

Change of
nation-
ality.

Natural-
ization.

provisions of 13 Geo. III, c. 21¹. In fact the child of a naturalized British subject is only a British subject if (1) he is born in the Queen's dominions, or (2) he be an infant at the date of his parents' naturalization and become a resident in the United Kingdom after it, or (3) he reside with his father, while the father is in the service of the Crown, out of the United Kingdom².

4. The marriage of an alien woman with a British subject makes her a British subject; conversely, the marriage of a female British subject with an alien makes her an alien.

Alienage.

5. A foreigner born in the United Kingdom may under the Naturalization Act make a declaration of alienage and so divest himself of the allegiance which the locality of his birth imposed upon him. And a British subject of the Queen may do what is equivalent to a declaration of alienage, and divest himself of his British nationality by becoming a naturalized citizen of a foreign state.

6. An Act of Parliament can do anything, and a foreigner may be naturalized by statute, so as to make his children under all circumstances citizens of this country³.

Disabilities of aliens.

The disabilities of aliens have been greatly diminished by the Naturalization Act, 1870. Formerly they could not acquire lands; now an alien is under no disabilities, proprietary or contractual, save that he cannot own the whole or any part of a British ship. But he enjoys no political privileges. He cannot vote at any parliamentary or municipal election, nor is he qualified to hold any office⁴.

Allegiance may be *natural* or *local*. One who is a natural born subject of the Crown, whether at Common Law or by statute, owes allegiance to the Crown wheresoever he may be. Local allegiance is due from an alien resident in the Queen's dominions, during the period of his residence. During such

¹ In re Bourgeoise, 41 Ch. Div. 310.

² 58 & 59 Vict. c. 43.

³ Co. Litt. 129 a.

⁴ The Crown can confer a *quasi*-naturalization by letters patent. The person so privileged is called a *denizen*. Blackstone, Comm. i. 374. He is, since 1870, in no better position practically than an alien.

period he is bound to observe those rules of conduct which the State enjoins for the maintenance of order, and to respect the institutions under which he is living for the time by refraining from any such attempt to change them by violence as the law considers to be treason.

§ 4. *Treason.*

The law relating to treason is connected with the law relating to allegiance in two ways.

Con-
nection of
treason
and
allegiance.

Treason committed by a person in allegiance, wheresoever he may be, has long been treated as triable in the English Courts, if at any time the offender can be brought within their jurisdiction¹. The liability to be dealt with for treasonable practices by the Courts of this country adheres to the British subject, and is personal, not local. Only in the cases of murder and manslaughter and that by comparatively recent legislation² can an Englishman who commits a crime abroad be tried for it in England.

Again, treason, when we first get an approximate definition of the offence, depended, like allegiance, on the personal character of the feudal relation. Treason was an offence against the person, the representatives, or the personal rights of the King: it was a breach of the feudal bond, a betrayal in one form or other of a lord. The vagueness of the early law on this subject led to a request by the Commons in 1352 that the King would legislate on the subject of treason, and the answer to their request was the statute on which the law of treason is still founded³. 25 Edward III. stat. 5, c. 2 names seven distinct offences:—

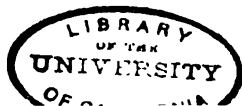
Definition
of treason.

(1) to compass or imagine the King's death, the Queen's,

¹ By 35 Henry VIII, c. 2, s. 2, this rule is laid down in all cases of treason, misprision or concealment of treason. The Act purports to be declaratory, and passed to allay doubts. 'Misprision' means failure to give information within a reasonable time.

² 24 & 25 Vict. c. 100, s. 9.

³ Mr. Maitland has pointed out that the object of the promoters of this Statute was not so much to define the limits of political obligation as to mark the distinction between treason and felony; the former resulted in a forfeiture to the king, the latter in an escheat to the lord. Pollock and Maitland, *Hist. of English Law*, ii. 506.



or that of the heir of the throne : (2) to levy war against the King in his realm : (3) to adhere to the King's enemies : (4) to violate the King's wife, the wife of his eldest son, or his eldest daughter, being unmarried : (5) to counterfeit the Great Seal, the Privy Seal, or coin : (6) to issue false money : (7) to kill the Chancellor, Treasurer, King's Justices of either bench, or of assize, in the discharge of his office.

One cannot fail to notice the personal character of all these offences. The King—not the Crown in Parliament, or the State as embodied in the existing constitution—is the object which the statute designs to protect. The King's person ; the King's sovereignty ; the King's family relations ; the *indicia* of the royal will in administration, the seals ; the representatives of the royal will in judicature, the Chancellor and judges ; the privileges of royalty, the coinage ; these are what a feudal society thought it treason to infringe.

The last four offences need no special notice ; they remain as treasons on the Statute book, though they may be dealt with as felony¹. The first three have been extended by construction, and have been the subject of much legal comment.

The additional treasons chiefly created in the reign of Henry VIII, of Elizabeth and Anne, none of long duration, and all now repealed, will be found to fall into two classes. They were the product of statutes which aimed at securing the kingdom against the aggression or influence of the Pope, or else at securing the succession to the throne as at the time settled.

Extension
of defini-
tion.

But the extensions by construction of the statute of Edward III are important in legal history. Compassing or imagining the King's death was construed to mean any act directed to the deposition or imprisonment of the King, or to acquiring the control of his person, or any measure concerted with foreigners for an invasion of the kingdom, or going or intending to go abroad for such purpose².

¹ 24 & 25 Vict. cc. 98, 99, 100.

² Stephen, *History of the Criminal Law*, 266.

Cases of mere riot were treated as 'levying war against the King'.¹

The Riot Act, 1 Geo. I, st. 2, c. 5, made it unnecessary to strain the definition of treason in order to punish disorder which had no political end in view. But the law of treason took no cognizance of offences against the State which could not be construed to be also offences against the person or personal authority of the King. It was not until 1795 that statutory force was given to the extended interpretations of the Act of Edward III, and an actual or contemplated forcible attempt to make the King change his counsels, or to intimidate both Houses or either House of Parliament was made treason. This Act was made perpetual in 1817. In 1848 all the acts, or compassings mentioned therein, which did not tend to the death, personal injury, or personal restraint of the Sovereign, were made treason-felony, and so not necessarily punishable with death². The treasons of 25 Ed. III still remain such on the Statute book. The Riot Act.
Modern definition of treason.

Treason, therefore, as distinct from treason-felony, is the doing or designing anything which would lead to the death, bodily harm, or restraint of the King, levying war against him, adhering to his enemies, or otherwise doing acts which fall under the Statute of Edward III.

Conspiracies to levy war, or to incite foreigners to invade the realm, may be dealt with either as constructive treason or as treason-felony³. Treason-felony.

And force contemplated, or applied, to make the King change his counsels, or to intimidate either House or both Houses of Parliament is treason-felony.

I have thought proper to treat to this extent of the law of treason, because it is a consequence of the relation of Sovereign and subject, or, as it might be expressed, of State and citizen. It is necessary for the purpose of this chapter to explain what

¹ Dammaree's Case, State Trials, vol. xv. p. 521.

² 11 & 12 Vict. c. 12.

³ Stephen, History of the Criminal Law, 280.

are the special liabilities of citizenship attaching to the subjects of the Queen, wheresoever they may be, as opposed to the general liability to obey the rules of public order, within the jurisdiction of the Queen's Courts. Beyond this it would be out of place here to deal with the legal definition of treason, or with the history of procedure in trials for treason.

§ 5. *Incapacity of the King.*

Causes of incapacity.

We have now to consider how the rights and duties of royalty are affected, when the King, from one cause or another, is incapable of discharging the duties of his office. This may arise in any one of four ways. The King may be absent from the kingdom. The King may be of imperfect capacity for his office by reason of his youth. The King may have lost the capacity for his office by reason of his insanity. The King may prove that he does not possess the capacity for his office from neglect of or contempt for the conditions under which it must be held.

In the first three cases the question arises of the constitution in one form or another of a Regency; in all four, difficulties may arise which are essentially similar in character.

(a) Absence.

The absence of the King, until recent times, was met by the appointment of one or more persons to transact the formal business of government in his absence. Until the office of Justiciar fell into disuse in the reign of Henry III it had been customary that the Justiciar should discharge the duties of royalty during the absence of the King.

Representatives of King in absence.

From this time it seems to have been most usual to appoint *custodes regni*, or *locum tenentes*, the first instance of such an appointment being in the thirty-seventh year of Henry III, when the Queen and the Earl of Cornwall were made guardians of the realm during the King's absence in Gascony¹. For

¹ Stubbs, Const. Hist. ii. 67. For a list of such appointments see Report of Committee appointed in 1788 to inquire into precedents in cases of the royal authority being interrupted by sickness, &c. Parl. Papers, 1787-1791 (Reports of Committees), iii. p. 80. Comm. Journ. 44, pp. 11-42.

the absence of Edward I at the time of his father's death special arrangements appear to have been made, and a small council of Regency settled upon a year beforehand, but the arrangements were confirmed by a council of the magnates held shortly after the commencement of the reign¹.

The appointment of Lords Justices under the Great Seal began with the absence of William III after the death of Mary, who, during her short reign, had been given power by statute to exercise the royal prerogative whenever William was out of England. The last instances of the appointment of Regents Post, p. 83. were in 1716, when the Prince of Wales was made Guardian and Lieutenant of the Kingdom, and in 1732, when Queen Caroline occupied the same position. On other occasions since 1695 Lords Justices have been appointed under the Great Seal with powers specified in the Letters Patent, which gave them their commission. This has not been done since 1821. The fact that the King or Queen is absent from the realm does not impair the validity of any executive act done during such absence; and modern facilities of communication have enabled the Queen to give the royal assent to bills, by commission, and to transact other business without inconvenience to the conduct of government during her visits to the continent².

The Infancy of the Sovereign raises other questions. The ^(b)Infancy. fiction of law is that the King must always be in the full maturity of intellectual power, and so would be exempt from the ordinary disabilities and immunities of infancy. Testamentary guardianship is the creation of statute, nor has it ever been suggested that the prerogative enables a King to appoint a guardian to his successor.

In our early history the case of an infant sovereign was variously met. The Barons appointed a *Rector Regis et Regni*

¹ Stubbs, Const. Hist. ii. 104.

² 2 Will. & Mary, st. 1, c. 6. See May, Parl. Practice, ed. 10, p. 485, and the reply of Lord Lyndhurst to Lord Campbell on the occasion of the Queen's visit to Germany in 1845; Hansard, 3rd series, vol. lxxxii, p. 1510.

Regencies
during
Infancy.

during the minority of Henry III, and a small Council with whom he should act: in the cases of Edward III and Henry VI Parliament made the nomination: the King himself and the magnates appointed a Council of Regency during the youth of Richard II: but Edward III and Richard II were both capable of executing some of the formalities of government, and opened the Parliaments at which the Councils of Regency were chosen. The Privy Council made Richard of Gloucester protector of the realm during the brief reign of Edward V. In the reign of Henry VIII we come upon the first Regency Act, and the only one of the kind that ever took effect. Parliament gave to Henry the power of nominating a Council of Regency, by Letters Patent or by will. This Council was to act in case the successor was a male and less than 18, or a female and less than 16 years of age. The King made the appointment, and though the Council exceeded its powers by making Somerset protector of the realm, its action was confirmed by the Lords and by Letters Patent issued by the young King himself.

28 Hen.
VIII, c. 7,
s. 23.

On other occasions since the reign of Henry VIII Regency Acts have been passed, nominating, or giving to the King the power of nominating, a Regent or a Council. But the duties of royalty have never since been discharged by a Regent in consequence of the infancy of the King.

(c) In-
sanity.
Regencies
during
Insanity.

The insanity of the Sovereign is not a matter which can be provided for beforehand, as is possible in the case of a minority. Happily the difficulty which it occasions has only arisen in two reigns, those of Henry VI and George III. The proceedings in the reign of Henry VI are marked with much simplicity and common sense, as compared with those of the later reign. Early in 1454 the insanity of the King was attested by a committee of the Lords, and the Duke of York was chosen by the Lords to be protector and defender of the realm. He accepted the appointment, the proceeding was thrown into the form of an Act which received the assent of the Commons, and the Duke was Regent until

Henry VI.

the King recovered ten months later¹. At the end of his year of recovery Henry VI became once more insane, Parliament, which had been prorogued, met, and at the request of the Commons the Lords nominated a Protector, their choice again falling on the Duke of York. This time the King seems to have been able to go through some formalities, and to appoint the Duke by Letters Patent. In a few months he recovered.

In the reign of George III Parliamentary procedure had become so far settled as to raise technical difficulties which had not occurred to the Lords and Commons of the fifteenth century. And yet, when George III became insane, the Houses had the precedents of 1688 before them, and might have followed the procedure of the Convention Parliament, with this advantage, that at the time of James' flight Parliament was dissolved, while in 1788 a Parliament was in existence, though not sitting.

The Convention Parliament had proceeded by Address, requesting William and Mary to undertake the kingly office. It would have seemed obvious that the same course should be followed in 1788, that the two Houses should present an address to the Prince of Wales requesting him to discharge the duties of royalty during the insanity of the King.

There was no practical dispute between Pitt and Fox as to the person who should be Regent. Fox maintained that the Prince had a right to the Regency, which Parliament was bound to bring into effect, Pitt maintained that the Prince had no right in the matter, but that he was the most proper person to be invited to become Regent. That which really exercised the two parties in the State was the limit which should be set upon the exercise of the prerogative by the Regent. Pitt wished to impose restraints, but inasmuch as the Prince was on friendly terms with the Opposition Fox wished to minimize the restraints which it was admittedly necessary to impose. It was difficult, if not impossible, to

George
III.

The dis-
putes of
1788.

¹ Stubbs, Const. Hist. iii. 166, 167.

combine procedure by address and limitation of powers. The Convention Parliament had affixed conditions to the tenure of the Crown but had not limited the prerogative. It followed that a Regency must be created by statute: but a statute needed the royal assent: the King could not give the royal assent in person, nor could he authorize by sign manual the affixing of the Great Seal to a Commission which should enable others to give his assent.

The
fictions
of 1788
and 1810.

The difficulty was overcome by a series of fictions. The two Houses were invited by Ministers to concur in directing the Chancellor to put the Great Seal to a Commission for opening Parliament, and subsequently to another Commission for giving assent to the Regency Bill when it had passed the two Houses. Before the matter reached this stage the King had recovered, but the same procedure was employed when in 1810 it became necessary to pass a Regency Bill.

It is to be observed that the Irish Parliament, being unaffected by the considerations of English parties, proceeded by address, and thus avoided the use of a fiction at once grotesque and dangerous¹.

(d) Moral
incapacity.

Edward
II.

The last form of royal incapacity for government is illustrated in Edward II, Richard II, and James II. The cases differ, since the first two were cases of formal, if involuntary, resignation, the last was a flight. The deposition of Edward II was marked by forms which do not conceal the violence of the transaction. Parliament was summoned by writs issued in the King's name by the younger Edward, who had been proclaimed guardian of the kingdom on the assumption that the King had fled. Before Parliament met the Great Seal had been obtained from Edward II, and the writs were issued in proper form. When Parliament met it accepted the younger Edward as King, drew up reasons for the deposition of Edward II, and when the deposed King would not meet the

¹ For a clear account of the Regency question as it presented itself to the British and Irish Parliaments, see Lecky, *Hist. of England in the Eighteenth Century*, vi. pp. 416 427.

Houses, they, by their procurator, renounced their homage and fealty.

In the case of Richard II a deed of resignation was executed by the King, and presented to the Parliament summoned to receive it. A statement of reasons for his deposition was drawn up, as in the case of Edward II; these were voted to be sufficient, Richard was deposed, and the sentence was communicated to him by Commissioners, who bore at the same time the renunciation of homage and fealty. It was not till then that Henry IV came forward to state to Parliament his claim to the throne; this was admitted, the assembly accepted him as King, and he was led to the throne. Richard II.

The case of James II has been fully treated earlier in this chapter. It differs from the other cases mainly in two points. James did not resign but fled, and the members of the Convention Parliament treated this flight as a constructive abdication, while they added in the Petition of Right such a list of misdeeds on the part of James as made the construction which they put on his flight amount to a formal deposition. And secondly the question was complicated by the political theories and Parliamentary forms with which a medieval Parliament did not allow itself to be embarrassed; while the religious questions unknown to the thirteenth and fourteenth centuries caused religious disabilities to be attached to the Crown and gave a distinctly conditional character to its tenure. James II.

§ 6. *The King's Family.*

We must, in conclusion, consider what are the relations of the King or Queen Regnant to the royal family, and wherein the family relations of the Sovereign differ from those of a subject.

The Queen Consort is a subject, though privileged in certain ways. Her life and chastity is protected by the law of treason. She has always been regarded as free from the disabilities of married women in matters of property, contract, A King's wife.

and procedure. She could and can acquire and deal with property, incur rights and liabilities under contract, sue and be sued, as though she were *feme sole*. She has her separate officers, and legal advisers. But in all other respects she is a subject and amenable to the law of the land, save in respect of some small privileges which are not in use. At one time she had a revenue from the demesne lands of the Crown, and a portion of any sum paid by a subject to the King, in return for a grant of any office or franchise. This was the *aurum reginae* or queen-gold¹. Provision is now made by statute for the maintenance of a Queen Consort.

A Queen Dowager ceases to be under the protection of the law of treason. It is said by Coke that she may not marry again without the King's licence, but this is questioned².

A Queen's
husband.

A Queen Regnant holding the Crown in her own right has all the prerogatives of a King³. The position of the husband of a Queen Regnant has varied in each case that has arisen.

Philip of
Spain.

On the marriage of Mary Tudor with Philip of Spain, it was provided that the Queen should enjoy all the prerogatives and possessions and exercise all the powers of the Crown as sole Queen, though official documents should issue in their joint names: that Philip should not alter the laws, nor compel the Queen to leave England, nor introduce aliens into office, nor if he survived his wife set up any claim to power or property⁴. A later Act made it treason to compass his death. It is impossible to read the first of these Statutes without being struck by the difficulties which must have arisen if Philip had wished to reside in England or had taken an active interest either in his wife or her kingdom.

William
of Orange.

William III declined to be a King Consort: and the Bill of Rights provided that 'entire, perfect, and full exercise of the regal power should be only in and executed by his Majesty in the names of both their Majesties during their joint lives.'

¹ Blackstone, Commentaries, i. 220. Queen-gold is the subject of a learned treatise by Prynne.

² Blackstone, Comm. i. 223.

³ 1 Mary I, st. 3, c. 1.

⁴ 1 & 2 Ph. & M. c. 10, s. 3.

When William was absent from the kingdom, Mary was given a general power to 'exercise and administer the regal powers and government,' saving the validity of acts of State done by William during his absence abroad¹.

George of Denmark did not occupy so favourable a position. He had been introduced into the Privy Council, though not sworn, in 1685, and he was naturalized by Act of Parliament in 1689. But by the time that Anne succeeded to the throne, the Act of Settlement had been passed, and he would have fallen under the disqualifications as to property and office which attached to aliens as soon as that Act came into force by the death of Anne. This disability was cured by a clause in an Act which enabled the Queen to grant him a revenue if he survived her², but he died before his wife. George was therefore a subject of the Queen, differing from others only in the conditions of his naturalization.

When Queen Victoria had declared her intention to ally herself in marriage with Prince Albert of Saxe-Coburg and Gotha, the Prince was given by Statutes³ the full rights of a citizen of the United Kingdom when and so soon as he had taken the oaths of allegiance and supremacy. The Prince was therefore a subject of the Queen. Like George of Denmark he was introduced into the Privy Council but not sworn⁴, unlike him he was never a Peer of Parliament. His precedence was determined by an exercise of the prerogative to be next to that of the Queen, and in 1857 the title of Prince Consort was conferred upon him by Letters Patent. As a matter of law he differed only in title and precedence from any other subject of the Queen.

Of the children of a reigning Sovereign, the eldest son, and daughter, and the eldest son's wife alone have any special

¹ 2 Will. & M. st. 1, c. 6.

² 1 Anne, c. 2.

³ 3 & 4 Vict. cc. 1 & 2. The first of these Acts set aside the effect of 1 Geo. I. stat. 2, c. 4, which forbade the passing of any naturalization bill without a clause confirming the political incapacities imposed by the Act of Settlement. This Act was repealed in 1867.

⁴ Greville Memoirs, iv. 374, and Appendix.

The eldest son. privilege. The eldest son is Duke of Cornwall by birth, and is created Prince of Wales and Earl of Chester by Letters Patent. It is treason to compass his death, or to violate the chastity of his wife, or of the eldest daughter, unmarried, of the King or Queen. But the royal children have only such precedence as is conferred upon them in the Parliament and Council Chamber by an Act of Henry VIII¹.

The custody of the royal children. In 1718 the judges by a majority of 10 to 2 advised that the care and education of the King's grandchildren, being minors, belonged to the King, the rights of the father being to this extent superseded. The question arose in the quarrels of George I and his son. No such point was raised in the disputes which raged between George II and Frederick, Prince of Wales; but George III, early in his reign, quarrelled with his brothers for marrying subjects, and obtained the passing of the Royal Marriage Act². By this Act no descendant of the body of George II, except the issue of princesses married into foreign families, can make a valid marriage unless the King or Queen Regnant has given consent under the Great Seal. But such descendants at the age of 25 may marry without the royal sanction, after giving 12 months' notice to the Privy Council, unless during that time the two Houses of Parliament have expressed disapproval.

Their marriage.

¹ 31 Hen. VIII, c. 10.

² 12 Geo. III, c. 11.

CHAPTER III.

THE COUNCILS OF THE CROWN.

SECTION I.

THE COUNCILS BEFORE 1660.

§ 1. *The growth of the Council.*

THE King, as we have seen, never acts alone. That which he does in the department of judicature he does through his representatives in the Courts. That which he does in administration he does through the intervention or on the responsibility of a Minister or Ministers, or of the Privy Council. The general policy of his government is determined by the advice of the Cabinet.

I will not dwell at this moment upon the King as judge, or upon the details of administration. In the present chapter I would ask what has been the history and what are the present circumstances of the three great Councils of the Crown: the House of Lords, with the judges and law officers who share in its summons; the Privy Council, which is necessary for the transaction of certain formal acts of State; the Cabinet, which settles questions of general policy and determines the action which shall be taken by the departments.

The materials for the history are ample enough, but this does not make it easier to form conclusions as to the character of the King's Councils at any given times, in theory and in fact, or to mark the stages of transition by which we have

reached the conditions of the present day. The King can take counsel of whom he will, but we shall always find that there are certain persons specially entitled to offer advice, and certain persons under a special liability to give advice. To these we may add a group, not always so distinct, of persons whose advice is habitually asked for, given, and acted upon. These groups, although they preserve a perceptibly separate existence throughout our history, yet appear to be constantly fading into one another, and when they are classified and named by eminent writers it is difficult on closer inquiry to find the consultative bodies which correspond to the names.

The four
Councils
of Coke
and Hale.

Coke tells us that the King is assisted by four Councils : (1) The *Commune Concilium* or Court of Parliament, (2) The *Magnum Concilium*, or House of Lords, (3) The Privy Council for matters of State, and (4) The Council of the Law, consisting of the judges. Hale also describes four Councils, agreeing with Coke as to the first two, but placing a *Concilium Ordinarium* between the *Magnum Concilium* and the *Concilium Privatum* and omitting the Council of the Law.

The last two Councils of Hale might be thought to correspond with the Privy Council and the Cabinet, but we must not apply modern ideas to the terminology of the seventeenth century. It will be better to try to ascertain what the four Councils of Hale really were.

And here we must note a tendency in every successive Council, first to increase in size, then to form within it a nucleus of advisers who transact the more important business, then to become two bodies in all but name, the real and the titular councillors, lastly to part in name as well as in fact, whereupon the smaller Council in turn runs the same course.

The Com-
mune Con-
cilium.

We can trace this process soon after the transformation of the Witan into the *Commune Concilium*, wherein the qualification for membership rested on the tenure of lands from the Crown. Within this assembly of magnates developed the group of great officers of the household and of State, who,

sitting with their staff of subordinates in *Curia* or in Exchequer, transacted the judicial and financial business of government. It would perhaps be an anticipation of modern ideas to say that the *Curia* was the executive, the *Concilium* the legislative and deliberate body¹, but this distinction between the two bodies tended to become more marked as the larger body expanded from an assembly of magnates into an assembly of tenants-in-chief, the *Commune Concilium* of the Charter.

This assembly of tenants-in-chief in its turn gave way to the assembly of estates, the clergy, baronage, and commons, summoned in person or by their representatives to advise and assist the Crown in Parliament. Here, if anywhere, is the *Commune Concilium* of Hale and Coke. Gives way to Parliament.

Of these estates one, the baronage or magnates, from its composition, was more easily brought together for purposes of consultation, and, from its power, was more necessary for purposes of consent. It represented the Concilium of the Norman kings before that assembly was afforded by the summons of the tenants-in-chief. Hence it remained and still is a council of the Crown, the *Magnum Concilium* of Hale and Coke. The Magnum Concilium.

Meanwhile the *Curia*, if we may assume that it was a separate and definite body, existing for the combined purposes of council and administration, gradually disappeared as the departments of government emerged. The Chancery parted from the Exchequer in the end of the twelfth century; the Common Law Courts with their special jurisdictions became distinct in the course of the thirteenth: and there comes into existence a Council which includes the great officers of State. The members of this Council have, in addition to such departmental duties as any of them might discharge, the duty and responsibility of advising and acting with the King. The Continual Council.

This body, ill-defined as to constitution and powers, but always in immediate attendance upon the King, appears first

¹ Stubbs, Const. Hist. i. 387, 388.

during the minority of Henry III. It is distinct from the larger deliberative assembly, the *Commune Concilium*, from the more frequently summoned assembly of the magnates, and from the judicial and financial staff which transacted the business of the Courts, the Chancery, and the Exchequer.

In the middle of the thirteenth century it had assumed so definite an existence that the mode of its selection forms an important feature in the Provisions of Oxford¹. From the reign of Henry III we may venture to say that it was an assembly of a corporate character: its members were sworn as councillors of the Crown: general questions of policy were here discussed, and prepared, if necessary, for the consideration of the estates of the realm: finally it was the medium through which the King, himself irresponsible, performed acts of State². It is the *Continual Council*.

Confusion
of Coun-
cils

We should note an uncertainty which existed for some time after Parliament had come into existence, as to the legislative powers of the Crown when acting with a body which was neither the King's Council nor the National Council, but the King's Council *plus* the estate of the baronage. Edward I used such an assembly for purposes of legislation³. Edward III tried to obtain grants of money from a body which consisted of Council, baronage, and a selected representation of the commons⁴. Yet it is possible to distinguish the Great or General Councils of the magnates, occasionally summoned to advise the King, from Parliament on the one hand and the Continual Council on the other. The confusion clears away as the legislative rights of the commons are recognized and insisted upon. The Great Councils were summoned from time to time on special occasions throughout the fourteenth and fifteenth centuries, and on these occasions they transacted

gradually
disap-
pears.

¹ Provisions of Oxford. Stubbs, Documents, 396.

² The order for expelling the Jews (1290) was made 'per regem et secretum consilium.' Ibid. 435.

³ As in the passing of *Quia Emptores*; and see Stubbs, Const. Hist. ii. 26.

⁴ Rot. Parl. ii. 253, 257, and see vol. i. Parliament, 228, 291. Hale, Jurisdiction of Lords' House, p. 8, says, 'The form of these great Councils ever varied.'

such business as might have been dealt with, although important, at the Continual or Privy Council. On two occasions only was a Great Council summoned in the seventeenth century¹. The baronage assumes its position as an estate of the realm and a House of Parliament. The *Magnum Concilium* survives in certain privileges of the House of Lords and in certain duties of the judges and law officers of the Crown.

So we may leave the first two of Hale's Councils, and watch the developments of the Continual Council. If the minority of Henry III first gave a definite existence to this Council as a group of responsible advisers, the minority of Richard II was the time when its powers were defined as practically co-extensive with the prerogative².

The business of the Council covered the whole field of executive action: its members were appointed for a year, but were usually re-chosen; they were bound to attend its meetings, and were paid for their services³.

I have already spoken of the attempts of the Commons to control the appointment of the Council, of their moderate success between 1377 and 1422, of their cessation after the latter date; these matters, together with the changes in the composition of the Council during the fifteenth and sixteenth centuries, relate to the limitations on the power of the King rather than to the constitutional history of the Council. Whether the Council was made up of great feudal lords, as in the later period of the Lancastrians, or of men of business of no great birth or estate, as under the first Tudors, or whether, as in the earlier part of the fifteenth century, both these elements were present, the powers of the Council were much the same; only in the first case they might be used as a check upon the

Post, p.
140.

Powers of
Continual
Council.

Its rela-
tion to the
Commons.
Ante,
pp. 19, 21.

¹ Such Councils were summoned by Charles I in 1640, and by James II in 1688. Clarendon, *Rebellion*, ii. s. 34. Macaulay, *History of England*, ch. ix. vol. iii. 262. Clarke, *Life of James II*, vol. ii. p. 238.

² Stubbs, *Const. Hist.* iii.

³ Nicolas, *Proceedings of Privy Council*, i. p. v; and see lists of members of the Council, *ibid.* 237, 295.

King; in the second, the King, himself irresponsible, might use the Council and its powers with formidable effect.

But assuming that from the end of the fourteenth century the Council was admitted to be,—with the King, and subject to his initiative,—the executive of the country, there are three points to be noted in its history between this date and the Rebellion. They are (1) the development of an outer and an inner Council; (2) the judicial powers of the Council; (3) the closer relations of Council and Parliament.

§ 2. *The Ordinary and the Privy Councils.*

The Councils of the fourteenth and fifteenth centuries were the Great Council, and the Continual or Privy Council¹, the former summoned for special occasions, the latter in constant attendance upon the King. Between the years 1460 and 1540 there is a blank in the records of the Council, and when we are able to resume the narrative of its proceedings we find that the Great Council has fallen into abeyance, and that another sort of Council, the *Concilium Ordinarium*, has come into existence.

The
ordinary
Council-
lors.

An obscurity hangs about this Council, both as to origin and composition. It is not the same body as the Privy Council. The latter Council varied much in numbers during the Tudor reigns; it was sometimes divided into two groups, one to attend the King when he moved about the country, the other to transact business in London²; it was also divided into Committees³, to each of which some department of executive business was assigned. But outside the body of Privy Councillors there appear to be a number of persons sworn of the Council yet not habitually summoned to those meetings which are recorded as meetings of the Privy Council.

¹ The term 'Privy Council' dates from the reign of Henry VI. Nicolas, *Proceedings of Privy Council*, i. p. lxxii.

² Nicolas, vii. pp. xv, xx.

³ Burnet, *Hist. of Reformation*, v. 119.

The accounts which we have of this Council, whether we turn to the precise description of the *Concilium Ordinarium* by Hale¹, or to less explicit references in documents of the Tudor period, all suggest that the *ordinary* counsellors were chosen mainly for legal or judicial purposes. Their legal character.

Hale treats of the *Concilium Ordinarium* chiefly in its relations to the Courts of Law. Henry VIII, in November 1541, orders his Chancellor to summon his 'counsellors of all sorts, spiritual and temporal, with the judges and learned men of his Council²,' to hear of the misconduct of Katherine Howard. The ordinary Council does not correspond to Coke's 'Council of the Law³,' which was confined to the judges, whereas there seems to be no doubt that among the ordinary counsellors were persons of rank and dignity⁴, and learned lawyers who had not attained to the Bench⁵.

It is very likely that Hale, writing at the end of the seventeenth century, describes this Council with more exactitude than is justified by the facts of its history; and indeed one must admit that it is impossible to dogmatize about the constitution, at any given time, of Councils whose existence was never defined by rules of law and whose composition was mainly determined by practical convenience. The judges are liable to be called upon for advice, the Privy Council are regularly and habitually consulted and have become the recognized channel of executive action. It was convenient during the Tudor period that the legal and judicial element in the Council should be strengthened by the addition to the King's Councils of men whose advice on general matters of State was not required: and we may be further justified in

¹ Hale, Jurisdiction of the Lords' House, c. ii.

² Nicolas, Proceedings of Privy Council, vii. p. xix.

³ Co. Litt. 110 a.

⁴ As for instance the Bishops of London and Rochester and Lords St. John and Windsor. Nicolas, Proceedings of Privy Council, vii. p. xxii.

⁵ The conciliar functions of the judges survive in the writ of attendance which they receive at the commencement of each Parliament. (Part I. p. 52.) The learned men of the Council are to be found in the King's or Queen's Counsel learned in the law.

saying that occasional councillors for non-legal matters were sometimes introduced. Yet these institutions are essentially elastic, they are different at one time and at another, but the process of change is impalpable.

Changes
in the
Privy
Council.

After the close of the Tudor period we hear no more of Ordinary Counsellors, save in the later description of Hale.

The Privy Council itself underwent changes in the sixteenth century. It changed in number, consisting of eleven members at the accession of Henry VIII¹, and of forty under Edward VI². Throughout the reigns of Mary and Elizabeth the number of the Council is much in excess of the number who habitually attended. We find too a change in the composition of the Council as compared with the previous century. New men devoted to the business of official life and of no great weight in the country were introduced by Edward IV and pervade the Councils of the Tudors³. This had been the advice of Fortescue⁴, who thought that the King's business suffered from the inattention of great lords, engrossed in their own affairs and in the advancement of their families and dependants.

Begin-
nings
of the
Cabinet.

The formal division of the Council into Committees by Edward VI and the assignment of the most important business to a Committee of State⁵ may or may not have continued, but the practice of discussing important business in an interior Council seems to have become permanent. How far such discussion was followed by immediate action, how far it was merely preparatory to a formal meeting of the Council, may not be clear. But the Committee of State of

¹ Nicolas, *Proceedings of Privy Council*, vii. p. 4.

² Burnet, *Hist. of Reformation*, v. 117.

³ In 1536 the Yorkshire rebels complained that there were too many persons of humble birth in the Council: Henry VIII replied that it contained more of the nobility than when he came to the throne, but added that 'it appertaineth nothing to any of our subjects to choose our Council.' Nicolas, *Proceedings of Privy Council*, vii. p. iv.

⁴ *Governance of England*, ch. xv. ed. Plummer, p. 145.

⁵ Burnet, *Hist. of Reformation*, v. 119. The King sat with this Committee for matters of most importance.

1553 reappears under that title in 1640, when it is also described as a 'Cabinet Council' by way of reproach¹.

It seems almost inevitable that unless the entire Privy Council was often reconstituted the treatment of important matters must pass into the hands of a few. The Council would always contain men qualified for one cause or another to be Councillors of the Crown but not possessed of the practical sagacity, promptitude of judgment, and force of character which come into play when some crisis calls for immediate action and nothing that can be done is free from risk. The men who possess these qualities would be the men to form the 'Committee of State,' the 'junto,' the 'Cabinet.'

§ 3. *The Judicial Powers of the Council.*

The severance of the Common Law Courts from the *Curia* had not exhausted the judicial powers of the Crown. Those who wanted remedies which the Courts of Law could not supply, and those who wanted redress which the Courts of Law could not enforce, came to the Crown as to the fountain of justice, and the Crown in Council did for the suitor what the King's grace might prompt. The Chancellor, who was usually a lawyer as well as an administrator, carried into the Chancery a good deal of the judicial work of the Council; but successive Chancellors gradually confined their jurisdiction to cases in which they supplemented the Common Law, and built up a body of equitable rules respecting uses, fraud, and the enforcement of contracts.

In the reign of Edward III, as we are told by Coke² and Selden³, there were three Courts into which writs *coram rege* were returnable: they were so returnable *in Banco*, *in Camera*,

¹ The Hardwicke Papers, ii. 147, contain the minutes of a Cabinet Council of August 16, 1640. See too Clarendon, *History of the Rebellion*, bk. ii. ss. 61, 99.

² Coke, *Institutes*, iv c. 5.

³ Selden, *Discourse on Laws and Government of England*, ii. c. 3.

in Cancellaria—in the King's Bench, the Council Chamber, or the Chancery—and the coercive jurisdiction of the Council, though a subject of remonstrance on the part of the Commons, grew more necessary as the numerous households and retainers of the great lords¹ spread disorder for which the ordinary litigant had no remedy.

A poor
man's
court.

This jurisdiction served two objects, the assistance of the weak or the poor, and the maintenance of order.

In the first of these cases the Council acted as did the Chancellor, upon the receipt of a bill or petition. In rules made for its governance in 1390 the Lord Privy Seal and others were to deal at once with the bills of persons of small importance; again in 1424, its members were enjoined in dealing with petitions not to meddle with such matters as were determinable at the Common Law, unless they should '*feel too great might on the one side, and unmight on the other, or else other reasonable cause that should move them*'². Similar in character is an ordinance of 1443. With the same object we find it provided in the ordinance for the household of Henry VIII, that of those members of the Council who were in constant attendance on the King, two should sit daily in the Council Chamber at certain hours to hear '*poor men's complaints*'³.

The
White-
hall
and the
Court of
Requests

We may follow this jurisdiction to its close. It became the Court of Requests, sitting in the Whitehall, consisting of certain members of the Council and some lawyers, '*Masters of Requests*,' to hear matters referred to it by the Council, or matters which came directly before it. One of the Committees constituted by Edward VI was '*for hearing of those*

¹ The great lords had councils of their own. See Fortescue, ed. Plummer, pp. 308-310. 16 Ric. II, c. 2, forbids lords or ladies to compel appearance before their councils on any disputed right to real or personal property under penalty of £20. The Act, 31 Hen. VI, c. 2, giving power to the Council to deal with cases of riot and oppression, has already been referred to; *supra*, p. 20.

² Nicolas, *Proceedings of Privy Council*, i. 18: iii. 149.

³ Ordinances for regulation of Royal Household, 159, 160, and see Nicolas, vii. p. viii.

suits which were wont to be brought before the whole board.' This Committee may have been the Court of Requests; it was presided over by the Lord Privy Seal, and contained two Masters of Requests who were not members of the Council. Judgments of the Court were enforced by a writ of attachment under the Privy Seal for disobedience to its orders. As to the validity of such a writ a question was raised in the Common Pleas in 1598, and it was adjudged that the 'Court of Requests or the Whitehall was no Court that had power of judicature¹.' This denial of judicial power to the Court of Requests was lamented by Coke, for it had done justice cheaply and speedily.

Such was one aspect of the Council's jurisdiction; but it also dealt with offences against order, disregard of proclamations, fraud, forgery and the mutilation of documents, perjury, conspiracy; it punished these with fine, imprisonment, the pillory, loss of ears, and whipping².

This seems to have been an original jurisdiction of the King's Council, sometimes, but not necessarily, exercised in the Star Chamber. The often-cited Act 3 Henry VII, c. 1 constituted a committee of the Council, the Chancellor, Treasurer, Lord Privy Seal, or any two of them, with a spiritual and a lay member of the Council, and with the addition of the two Chief Justices, or other two judges, to deal with cases of livery and maintenance, misconduct of sheriffs, and other specified offences against order. A later Act added the President of the Council to this Court³.

A court to
enforce
order.

The Star
Chamber.

The object and effect of this Act has been much discussed. Let us first look at the facts. The Council did not cease to exercise some criminal jurisdiction throughout the reign of Henry VIII, and in 1540 took power to compel those whom it summoned to enter into recognizances to attend its pleasure until they were dismissed, a power constantly exercised and,

¹ Coke, *Inst.* iv. p. 97.

² Acts of the Privy Council, ed. Dasent, i, 39, 105, 124, 209.

³ 21 Hen. VIII, c. 20. This jurisdiction is recognized in 5 Eliz. c. 9, § 7.

one must suppose, in a manner very irksome to the subject¹. Among the Committees which Edward VI appointed, one was to deal with offences against order, the disregard of proclamations, and the infliction of the necessary punishments²; and during the reigns of Mary and Elizabeth we find the Council dealing with offences, mostly in the nature of seditious language, and ordering punishments.

How
different
from Privy
Council.

But side by side with this jurisdiction of the Privy Council we find existing another jurisdiction, that of the Lords of the Council sitting in the Star Chamber³. To this Court matters are constantly referred by the Privy Council in the reigns of Henry VIII, Edward VI, Mary, and Elizabeth; and when the Star Chamber is mentioned in the Acts of the Council, it is as the Court in which a case should be tried⁴, an individual appear⁵, a jury be censured⁶. Once there is a suggestion of jealousy on the part of the Council. Sir William Paulet, whose case had been deferred that he might formulate his charge, transferred it to the Star Chamber. The Council ordered that a matter brought before their table should not be removed to another Court without their authority, and required Paulet with all speed to exhibit his bill of complaint

¹ Nicolas, vii. 27, and see Acts of the Council, ed. Dasent. Between April 1542 and the end of December 1546 no less than 158 such recognizances are recorded.

² Burnet, History of Reformation, vol. v. p. 117. There were six Committees: one to deal with the civil, one with the criminal jurisdiction of the Council: others for the State, for the revenue, for the collection of debts due to the King, and for the bulwarks.

³ When Cranmer on his first appearance before the Council was ordered to appear before them on the following day at the Star Chamber we seem to be on the point of identifying the two Courts. But the body which was present in the Star Chamber next day was a Committee of the Council 'appointed to sit upon the offenders.' It was not the Court of Star Chamber, for it transacted some administrative business, besides sending Cranmer to the Tower. Acts of the Privy Council, iv. 347.

⁴ Acts of the Privy Council, ed. Dasent, v. p. 71.

⁵ Ibid. i. p. 386: iii. pp. 41, 176, 216, 388: v. p. 193.

⁶ Ibid. vi. pp. 382, 411: vii. pp. 347, 207. In this last case the jury was summoned from Cornwall for acquitting a man charged with piracy, in order that the matter might be heard in the Star Chamber on the first day of Term.

before them¹. Thus while we have two Courts, both of them exercising inquisitorial and judicial powers, we find that one makes only an occasional use of these powers, and is engaged mainly in administrative work. It remains to ask whether the Star Chamber had powers which the Council did not possess or consisted of persons who might not sit in the Council. Their powers identical.

One cannot suppose that the offences designated in the Act of Henry VII might not, apart from Statute, have been dealt with by the Council at large, or that if they had been assigned to a Committee of the Council the King might not have summoned two judges, not members of the Council, to assist the Committee. But though the Act may not have created new offences or a new jurisdiction, it specified certain offences which should be dealt with, it revived for this purpose a power which the Council had always possessed², it invested certain persons with a special duty in respect of this power, and it thus gave a stimulus and a definiteness to the exercise by the Council of a coercive jurisdiction of a general character.

And though the jurisdiction thus exercised would seem to be that of the King's Council, the persons who compose the Court are not the same as those who habitually sit at the Council Board. All contemporary authority on the subject of the Star Chamber points to the inclusion of men whose dignity or learning strengthens the Court, but who are outside the circle of habitual advisers of the Crown. It might be said that the Concilium Ordinarium is here discernible, but I will not strive at greater precision than the evidence permits, and will say that the Star Chamber was a Council of the Crown, that it exercised a jurisdiction which Their composition different.

¹ Acts of the Privy Council, ed. Dasent, vii. 405.

² Thus Bacon says: 'In the Star Chamber a sentence may be good grounded in part upon the authority given the Court by 3 Hen. VII, and in part upon that ancient authority which the Court hath by the Common Law.' Bacon's Works, ed. Spedding, vii. 379.

the Privy Council might have exercised, but that it included persons whom the Privy Council did not include¹.

Abolition
of Star
Chamber.

In 1640 the Long Parliament passed an Act called 'an Act for the regulating the Privy Council and for taking away the Court commonly called the Star Chamber.' In the preamble to this Act, the Star Chamber is assumed to be a Court of criminal jurisdiction created by the Act 3 Hen. VII, c. 1. It is asserted to have exceeded the powers conferred by that Act and it is abolished. But the composition of the Court is suggested in the words which forbid 'any bishop, temporal lord, privy councillor, judge or justice whatsoever' to hear and determine any matter in the Court henceforth abolished. The Privy Council, or Council Board, is also forbidden to 'intermeddle in civil causes and suits of private interest between party and party;' and persons committed by the king in person or by order of the Council are to have a writ of *habeas corpus*.

The Long Parliament may have been historically wrong in tracing the origin of the Court of Star Chamber to the Act of Henry VII, but there can be no question that a distinction was drawn between the Star Chamber and the Privy Council as to their composition and as to the matters dealt with by the two Courts. With this enactment, the judicial powers of the King's Council acting as a Court of first instance within the jurisdiction of the Courts of law is brought to a close.

¹ Bacon describes the Court as compounded of four elements, Councillors, Peers, Prelates and Chief Judges. Works, ed. Ellis and Spedding, vi. 85. Camden names certain great officers, as composing the Court, 'et omnes consiliarii status tam ecclesiastici quam laici, et ex baronibus illi quos princeps advocabit.' Britannia, ed. 1594, p. 112. Sir Thomas Smith includes, in addition to 'the Lords and others of the Privy Council, as many as will, other Lords and Barons which be not of the Privy Council and which be in the town.' Commonwealth of England, bk. iii. ch. 4. Crompton says: 'Le Court de Star Chamber est Hault Court, tenus avant le Roy et son Conseil et auters.' Courts de la Roïne, pp. 29, 35. Finally, Hudson tells us that Lords of Parliament who were not members of the Privy Council claimed, and, in some cases, exercised, the right to sit and give judgment. Treatise of the Court of Star Chamber, Collectanea Juridica, i. 25, and see Prothero, Constitutional Documents, 1559-1625.

§ 4. *The closer Relations of Council and Parliament.*

The Commons had ceased, from 1422 onwards, to demand the nomination in Parliament of the King's Council. We do not know the time at which the Council ceased to be appointed for a year, and began to hold office during the King's pleasure; nor when they ceased to be paid for their services. Probably the Council of Regency which managed affairs in the minority of Henry VI set the example of an indefinite tenure of office; and the great lords who composed the later Lancastrian Councils were able to take care of themselves without payment.

Nomina-
tions in
Parlia-
ment.

From 1459 to 1621 there is no instance of an impeachment by the Commons. It would seem as though they had altogether relaxed their hold on the Executive.

And yet the connection between Council and Parliament grew closer under the Tudors. In the House of Lords the dignity of the Council was enhanced by the 'Act for placing of the Lords¹.' The Chancellor, the Treasurer, the President of the Council, the Lord Privy Seal, if peers, take place above the highest members of the peerage; the King's Secretary, if a bishop or a baron, sits above all other bishops or barons.

The
placing of
the Lords.

In the lower House the attempts to establish communications between the representatives of the Commons and the representatives of the Crown take different forms. Henry VIII used to require the Speaker² to be the exponent of his wishes, and on a few occasions his Ministers made unwelcome visits to the Commons House, of which they were not members³. But from 1560 onwards the King's Ministers, the Chancellor of the Exchequer and the Secretaries are active in debate, and the Tudor practice of adding to the constituencies and tampering with the electorate was designed to secure seats for Court officials and nominees. In 1614 the presence of Privy Councillors was noticed in the House of Commons, but though their right to be present was discussed, it was not

Communi-
cations
with the
Commons.

Presence
of Minis-
ters in
Commons,

¹ 31 Hen. VIII, c. 10.

² Stubbs, *Lectures on Mediaeval and Modern History*, 272.

³ In 1514 and 1523. *Parl. Hist.* i. 482-485.

contested and was never afterwards disputed¹. To admit members of the Council to discuss the King's business in the midst of them gave the Commons a surer mode of obtaining the control of affairs than the mere nomination of Ministers in Parliament. We approach the modern connection of Executive and Legislature, but it is by slow degrees. When the authors of the Grand Remonstrance, in 1641, asked that the King should only employ such Councillors and Ministers as could obtain the confidence of Parliament, they probably had no clear idea as to the mode in which that confidence should be expressed.

At least, the presence of Ministers in the House of Commons explaining their policy and the King's needs was a surer and more practicable mode of harmonizing Legislature and Executive than the use, however frequent, of the remedy by impeachment.

a better
security
than
impeach-
ment.

Impeachment was a valuable weapon when it was first instituted in the fourteenth century, and again when its practice was revived by the Commons in 1621 under kings who were ready to strain the Constitution to the point of rebellion. It was then important to be able to strike a heavy blow at the instruments of the royal will. But for the ordinary purposes of controlling or dismissing a careless, perverse, or incapable Minister, the Commons, with no other means in their power than impeachment, were much in the position of an employer, who could not dismiss a useless or impertinent servant, but must wait till he was able to proceed by indictment for larceny or assault. The authors of the Grand Remonstrance said truly 'that the Commons might have cause often justly to take exceptions at some men for being counsellors and yet not charge those men with crimes².' It was only by their presence in the House of Commons that Ministers could be made to understand that they were indeed the servants of the King, but of the King as the official representative of the people.

¹ Parl. Hist. i. 1163.

² Clarendon, Rebellion, bk. iv. s. 73.

SECTION II.

THE FAILURE OF THE COUNCIL.

§ 1. *The Council Board and the Inner Council.*

The Restoration did not give back to the Council the judicial powers which the Long Parliament had taken away. But though little else was changed in form, there was a change in the atmosphere of politics. In the struggle with Charles I the Commons had proved themselves the masters. They dealt liberally with Charles II in the matter of revenue, but if he wanted further supplies it was plain that he must come to Parliament. His Ministers and Council must be on friendly terms with the Commons.

The large Privy Council of Charles II was divided by the advice of Clarendon into Committees of which the most important was the Foreign Committee. They dealt with what we should now consider separate departments of Government¹, and their work when concluded was submitted to the Council. But matters of general policy were not discussed at a Committee, nor, until action was necessary, at a meeting of the entire Council.

In truth some part of the King's business was not suitable for discussion before a responsible body. Parliament must be kept, somehow, in communication with the Executive, for money was wanted and would not be forthcoming unless the Commons could be induced to approve the policy or condone the extravagance which caused the want. The Ministers of Charles II relied for a Parliamentary majority, not upon a community of political opinion with the Commons, but upon applications made to the good-nature, the loyalty, or the self-interest of individual members. The form which this application should take was settled at conferences between

¹ Thomas, Hist. of the Public departments, p. 26, and see Lord Selborne, Judicial Procedure of Privy Council, pp. 20, 21.

Ministers and leading members of the House. At first this business was left entirely to the Chancellor and Treasurer, to Clarendon and Southampton. Later the King intervened; first he invited others to the conference, then saw members himself, and made promises without much regard to the prospect of their fulfilment ¹.

The
Cabinet.

The Committee therefore which the King trusted 'in his most secret affairs' ² was distinct alike from the Foreign Committee, and from the entirety of the Privy Council. It was not a group of men of like opinions, for Clarendon strongly resented the introduction of Ashley, Coventry, and Arlington by the King. Nor were its members bound by the opinion of the majority, for Clarendon and Southampton successfully opposed a Bill for liberty of conscience introduced into the House of Lords by Ashley with the approval of the King ³. Its meetings were informal in place and character.

But in grave matters, such as the sale of Dunkirk ⁴, the result of discussion in this Cabinet was submitted to the full Council; votes were taken, and action thereby determined, nor was anything of moment transacted—so says Clarendon on his defence—without presenting the same first to the Council Board ⁵.

Its disconnection
with Parli-
ament.

The impeachments of Clarendon and Danby, and the storm of unpopularity which concluded the administration of the Cabal, made it plain that some means must be found for bringing Ministers into closer correspondence, and, if possible, to better terms with Parliament.

Temple's
scheme.

This was the object of Sir William Temple's scheme of 1679. He proposed to create a Council so representative that it should be acceptable to both Houses of Parliament, and capable of advising the King on all matters of State. The King and his Ministers approved the scheme; the Commons

¹ Clarendon, *Autobiography*, ii. 205.

² *Ibid.* ii. 243, 244. The Committee consisted of the Chancellor, Treasurer, two Secretaries of State, the Duke of York, the Vice-Chamberlain, and others added from time to time.

³ *Ibid.* ii. 344-349.

⁴ *Ibid.* ii. 248.

⁵ *State Trials*, vi. 377.

received it coldly. It is strange that Temple failed to see that a body of thirty, representative of every interest and of most political opinions, was not likely to be an efficient executive, whatever might be its merits as a debating society. But the scheme was started. The King dissolved the Privy Council, saying that its great numbers made it unfit for secrecy, and that this had 'forced him to use a smaller number in a foreign committee and sometimes the advices of some few among them for some time past¹.'

The Council was reconstituted on Temple's plan, but the old conditions revived. A Foreign Committee was almost immediately appointed. Temple himself joined a small group for the discussion of business outside the Council, and was presently indignant because the King formed a similar group in which he was not included. In a year's time things went on as before.

But if the Ministers were not satisfied with their relations to the Commons, neither were the Commons satisfied with their relations to the Ministers. When the business of State was no longer settled at the Council Board responsibility seemed to vanish. And matters did not improve in this respect after the Revolution. William III learned that it was well to employ Ministers who were in harmony with the majority in Parliament, but he was prone, upon occasion, to act for himself, and not always inclined to consult a Cabinet², still less a formal Council. If things went wrong the Commons found it hard to fix the blame.

William made the First Partition Treaty, and induced the Secretary of State and the Chancellor to supply him with powers couched in the necessary forms. When Somers was charged with this on his impeachment, he answered that he had affixed the seal on the authority of a sign manual warrant

¹ Temple's Works, ii. 525, 538, 541.

² Hardwicke State Papers, ii. Nov. 1701. Sunderland to Somers: 'It would be much for the King's advantage if he brought his affairs to be debated at that Council' (the Cabinet).

countersigned by a Secretary of State, that he had offered an opinion about the treaty, but was not responsible for its terms, and that he had acted as the King bade him ¹.

Clearly Somers should either have accepted responsibility for the terms of the treaty, or refused to affix the seal to the powers.

The collective responsibility of Ministers was not understood; for if Ministers who advised the Crown informally could set up a defence of this character, the responsibility of the King would supersede the responsibility of his Council.

§ 2. *Attempted Remedies.*

The Act
of Settlement.

The framers of the Act of Settlement met the difficulty in two clauses of the Act. They prevented the King from assuming responsibility in one form by enacting:—

‘That no pardon under the Great Seal of England be pleadable to an impeachment by the Commons in Parliament.’

They thought that they secured the legal responsibility of the King’s Ministers by the provision that—

‘From and after the time that the further limitation by this Act shall take effect, all matters and things relating to the well governing of this kingdom, which are properly cognizable in the Privy Council by the laws and customs of this realm, shall be transacted there, and all resolutions taken thereupon shall be signed by such of the Privy Council as shall advise and consent to the same.’

⁴ Anne,
c. 8.

Its clauses
abandoned.

This clause was repealed, together with the clause excluding placemen, in 1705. ‘It was visible,’ says Burnet ², ‘that no man would be a Privy Councillor on those terms.’ Nothing, therefore, but custom, based on practical convenience, has worked out the transition from government by the Crown in Council to government by a Cabinet consisting of Ministers indicated by the Commons;—from the legal responsibility of the individual Privy Councillor to the moral responsibility of

¹ Parl. History, v. 1281.

² History of his own Time, v. 241.

the collective Cabinet. The increased power of the Commons made this necessary; but the suspicion of the Commons, as shown in the repealed clauses of the Act of Settlement, had nearly made it impossible.

We are now at the parting of the ways between the old Council Board and the modern Cabinet. The Council had proved itself incapable of maintaining that close correspondence with the changing character of the House of Commons which had been desirable ever since the Restoration, and which had become necessary since the Revolution.

The determination of policy had passed from the Council into a loosely compacted body of Ministers called the Cabinet. We must trace the development of this body, and it will therefore be well to compare our present views of Cabinet government with those of the first year of the eighteenth century.

The Cabinet is to us a definite body, unknown to the law, but known well enough in fact: it consists of a group of persons who are collectively responsible for the policy and government of the country; it is not the Executive, but it controls and guides the Executive, and it contains the chiefs of the great executive departments; these persons are selected by, and work under, a chief whom we call the Prime Minister, and he is the most important member of that political party which for the time is in a majority in the country and the House of Commons.

But at the beginning of the 18th century one can only say that responsibility for the conduct of government had drifted away from the Council Board into the hands of a somewhat indefinite body of Ministers, to whom the word Cabinet suggested a reproach; that the individuals composing this body did not recognize their collective responsibility for the conduct of affairs; that they did not own allegiance to any one of their number; that they had not yet realized that their continuance in office must depend on a continuance of the support of a majority of the House of Commons.

The
Cabinet
now.

The
Cabinet of
the 18th
century.

SECTION III.

THE CABINET.

The Cabinet is the modern Council of the Crown. I will deal with it under four heads:—

- (1) The distinction of the Cabinet from the Privy Council.
- (2) The joint responsibility of the Cabinet.
- (3) The relations of the Cabinet to the Prime Minister and to the Crown.
- (4) The dependence of the Cabinet upon the majority of the House of Commons.

§ 1. *The Council and the Cabinet.*

Difference
in title
between
Cabinet
and
Council.

The Cabinet are 'Her Majesty's servants.' The Privy Council are 'the Lords and others of Her Majesty's most Honourable Privy Council.' To describe the Cabinet as a Committee of the Privy Council is somewhat misleading. Every meeting of the Privy Council from which the Queen is absent is a Committee, even if every member should be summoned and present. But inasmuch as the Cabinet meets for the purpose of advising the Crown, and is a body not formally constituted as such, nor as such bound by any oath or declaration to diligence and secrecy, it would seem that to be sworn of the Privy Council is a necessary prelude to admission to the Cabinet¹. The Cabinet meets to consider and advise how the Queen's Government may best be carried on in all its important departments; whereas the Privy Council meets to carry into effect advice given to the Queen

Difference
in action.

¹ Mr. Hearne (*Government of England*, p. 192) says that Lord Bute was made a member of the Cabinet by George III before he was Privy Councillor, but this seems to be a misunderstanding of a note to Walpole's *Memoirs*, i. p. 8. George II died on the morning of Saturday, Oct. 25. Lord Bute was sworn of the Privy Council on Monday the 27th (*Haydn's Book of Dignities*, ed. 2, p. 200). Horace Walpole, writing to Mann on the 28th, says, 'the Duke of York and Lord Bute are named of the Cabinet Council' (*Letters*, iii. 354).

by the Cabinet or by a Minister, or to discharge duties cast upon it by custom or statute. Committees of the Council meet to act or advise on specified matters, some being appointed in permanence, as the Committees for Trade or for Education, some *ad hoc*. It is necessary that a member of the Cabinet should be under the obligations of a Privy Councillor, because he is a confidential adviser of the Crown.

But the Privy Council is essentially an executive, the Cabinet a deliberative body. The policy settled in the Cabinet is carried out by Orders in Council, or by action taken in the various departments of Government. Committees of the Council may be appointed to advise on certain matters, but the Cabinet advises on all matters, and since its members are the heads of executive departments chosen by the Queen with the approval of her people, the advice of the Cabinet is acted upon.

The two bodies are differently summoned.

A summons to the Cabinet runs thus :—

Difference
in sum-
mons.

‘A meeting of Her Majesty’s servants will be held at the Foreign Office at — o’clock on Saturday, the — of May, at which — is desired to attend.’

A summons to a Council at which the Queen will be present is in the following form :—

‘Let the messenger acquaint the Lords and others of Her Majesty’s most Honourable Privy Council, that a Council is appointed to meet at the Court at — on — the — day of this instant, at — of the clock.’

When the Queen will not be present the form is as follows :—

‘Let the messenger acquaint the Lords of Her Majesty’s most Honourable Privy Council, that a Committee of their Lordships is appointed to meet in the Council Chamber, Whitehall, on — the — of — at — of the clock.’

Nor is it only in the form of the summons that the difference lies. The Cabinet is summoned by the Prime Minister, through his private secretary, two personages who have no

place in the legal theory of the Constitution. The Privy Council is summoned by the Clerk of the Council, an officer whose history dates back to 1540, when Sir William Paget, himself afterwards a Privy Councillor and Secretary of State, was appointed Clerk¹.

Confusion
of termi-
nology.

The Cabinet of the present day is then a body distinct from the Privy Council in title, in function, in mode of summons. Every member of the Cabinet is a Privy Councillor, and the connecting link between the two bodies may be found in the Privy Councillor's oath and the obligations which it involves.

But when we recur to the time at which Cabinet government is said to begin, we are puzzled at the variety of titles used to describe the body which determines questions of general policy. In the memoirs of the twenty-five years, 1690-1714, we find mentioned the Cabinet, the Lords of the Committee, the Committee of Council, the Lords of the Cabinet Council, and the Great Council.

The
Cabinet.

But this nomenclature becomes comparatively simple if we bear in mind that the *Cabinet* had already become the term for that group of Privy Councillors with whom the King took counsel on affairs of State; that the Great Council was the Privy Council assembled for the transaction of formal business, which was all that it was now permitted to do; that the Lords of the Committee, however they may be described, were Committees of Council. These might be standing committees, as the Foreign Committee, the Lords of the Committee, *par excellence*², or they might be committees appointed for a special purpose, as the body which was examining Guiscard on a charge of high treason³, when he

The Privy
Council.

The Com-
mittees of
Council.

¹ Nicolas, Proceedings of the Privy Council, vii. pp. ii. 4.

² See on this point Mr. John Morley's 'Walpole,' p. 146.

³ Bolingbroke, Letters, i. 102. As to another Committee, see Bolingbroke, i. pp. 167, 238. 'The Committee of Council which sits at the War Office is in a very declining state, and will, I believe, very soon expire.' The Committee which examined Guiscard consisted of ten persons, every one of whom was a great Officer of State. Swift calls it 'the Committee of Cabinet Council,' Bolingbroke, 'the Lords of the Council.' It probably was the Cabinet. See Swift, 'Narrative of Guiscard's examination.'

stabbed Harley, though this last may well have been the Cabinet.

Committees of the Privy Council, in fact, discharged much of the duty which now belongs to the Home Office, the Foreign Office, and the Board of Trade.

We can see all three bodies at work in the correspondence of Bolingbroke: the Cabinet which settled questions of general policy, sitting in the presence of the Queen; the Lords of the Committee, who worked through the details of the Treaty of Utrecht; the Privy Council, which gave its formal assent to the treaty, and authorized the Chancellor to affix the Great Seal to the ratification. Illustrations.

Thus too in the framing of the Treaty of Peace and Commerce with Spain, Bolingbroke writes to the Queen that 'the draft will be ready for the *Lords of the Council* to-morrow, and for the *Cabinet* on Sunday, when I humbly presume you would have the Cabinet sit as usual¹.' Again, five days later he announces that the Lords of the Council have gone through half the treaty and will finish it next day, and then 'my Lord President will take care to summon the *Great Council*, pursuant to your Majesty's commands for Thursday morning².' But the Great Council, that is the Privy Council, had now been reduced to formal executive action. In this respect its position had manifestly changed in thirty years, as may be seen by comparing the meeting to approve the sale of Dunkirk with the meeting to sanction the peace of Utrecht. The sale of Dunkirk was debated at length at the Council Board, though it had already been fully discussed at the Cabinet or Committee, and Clarendon mentions with satisfaction that there was but one dissentient voice³. When the Treaties of Peace and Commerce were laid before the Privy Council in 1713 and the Queen proposed their ratification, Lord Cholmondeley suggested a postponement for further consideration, but he was told that the time for exchanging ratifications The Committee.
The Cabinet.
The Council.
Privy Council a formal executive;

¹ 24th Sept. 1713.

² 29th Sept. 1713.

³ Clarendon, Autobiography, ii. 248.

was settled, and was so near at hand that no postponement was possible. The treaties thereupon passed the Council, and next day Lord Cholmondeley was deprived of his place in the Queen's Household¹.'

except on
the death
of Anne.

But on a celebrated occasion the Privy Council resumed the functions of a Cabinet. The meeting at Kensington, when Anne lay dying, was a meeting of the Council, and is so recorded in the Register; and their Lordships, 'considering the present exigency of affairs, were unanimously of opinion to move the Queen that she would constitute the Duke of Shrewsbury Lord Treasurer².'

Having ascertained that the Queen was in a condition to be spoken to, the wish of the Council was communicated to her by certain members of the Board. Shrewsbury was summoned to receive the staff of office, and on his return measures were taken for the security of the kingdom against a possible surprise by the adherents of the Stuarts.

This is, if not the last, at any rate a very exceptional exercise by the Privy Council of deliberative as well as executive powers. From the date of the Revolution we may say that the Cabinet became the motive power in the Executive of the country.

But though the functions of the two bodies are thenceforth tolerably distinct, the Cabinet itself is not always very clearly defined.

The
Cabinet an
undefined
body

William III sometimes preferred to act with smaller groups of Ministers in matters which were secret and important, or which specially concerned their departments. Thus Lord Normanby had been promised by the King that he should be summoned to meetings of the Cabinet. When William went abroad in 1694 he left instructions that there should be no meetings of the Cabinet while he was away, but that 'Lords should be summoned, sometimes one, sometimes

¹ Parl. Hist. vi. 1170. Swift's Journal, April 7 and 8, 1713.

² Register of the Council, 30th July, 1714.

another, as they should be judged most proper for the business they were to advise about¹. Such a meeting was held of the Secretaries, Lord Keeper, Lord Privy Seal, and two others. Lord Normanby complained that he was left out, and the King considered that there was no ground of complaint, that there was a distinction between Cabinet meetings and meetings of great officers of State 'summoned to consult on some secret and important affairs².' with an inner circle.

So there was already an outer and an inner Cabinet, and later in William's reign Sunderland, writing to Somers, desires to see the Cabinet limited in number, and regularly consulted—'none to be of the Cabinet but who have, in some sort, a right to enter there by their employments;' and 'it would be much for the King's service if he would bring his affairs to be debated at that Council³.'

Sunderland's view is clear. He first wished to limit the Cabinet to the holders of great offices, and then to see the whole Cabinet, and none others, the regular advisers of the Crown. But when the King ceased to preside at the Cabinet Council, as happened when George I came to the throne, one security for the limitation of the size of Cabinets was gone. Attempts to limit its size.

Anne presided every Sunday at a Cabinet meeting; the numbers of the Board were a matter of personal concern to her⁴. If a Minister or Privy Councillor had been promised a place in the Cabinet he might complain, as did Lord Nor-

¹ Shrewsbury Correspondence (Coxe), p. 34.

² Ibid. p. 38.

³ Hardwicke State Papers, ii. 461. The following is Sunderland's proposed list: The Archbishop, Lord Keeper, Lord President, Lord Privy Seal, Lord Steward, Lord Chamberlain, First Lord of the Treasury, two Secretaries of State. 'The Lord Lieutenant of Ireland must be there when in England. If the King would have more it should be the First Commissioner of the Admiralty, and the Master General of the Ordnance. If these two are excluded none can take it ill that he be not admitted.'

⁴ Bolingbroke writes to Strafford: 'The employment of First Commissioner of the Admiralty brings your Lordship into the Cabinet . . . which could not have been if the other employment (Master of the Ordnance) had fallen to your share, without making a precedent for enlarging the Cabinet, which Her Majesty had much rather confine than extend.' Letters, iii. 27.

manby, if he was left out. Hence we can understand her wish to limit the size of the Cabinets. But to the Hanoverian kings this was a matter of indifference; and throughout the reigns of George I and George II, and at any rate for the first twenty years of the reign of George III, there appears to have existed a large body of titular Cabinet Ministers, and a smaller body, the confidential Cabinet, the men who settled what was to be done.

Walpole's
Cabinets.

The first Cabinet of George I contained the Duke of Marlborough, who was scarcely ever invited to Cabinets of which he was a nominal member; and Lord Somers, whose infirmities prevented him from taking any part in public business¹.

In the reign of George II we have two complete lists² of

¹ Stanhope, *Hist. of England*, i. 104.

² *List of Cabinet*, 1737.

1. Archbishop of Canterbury.
2. Lord Chancellor.
3. Lord Godolphin (Lord Privy Seal).
4. Duke of Grafton (Lord Chamberlain).
5. Duke of Richmond (Master of the Horse).
6. Duke of Newcastle.
7. Earl of Pembroke (Groom of the Stole).
8. Earl of Hay.
9. Lord Harrington.
10. Sir. R. Walpole.
11. Sir C. Wager.
12. Duke of Devon.
13. Duke of Dorset.
14. Duke of Argyle.
15. Lord President.
16. Earl of Scarborough.

Life of Lord Hardwicke, i. 383.

List of Cabinet, 1740.

1. Dr. Potter (Archbishop of Canterbury).
2. Lord Hardwicke (Lord Chancellor).
3. Earl of Wilmington (Lord President).
4. Lord Hervey (Lord Privy Seal).
5. Duke of Dorset (Lord Steward).
6. Duke of Grafton (Lord Chamberlain).
7. Duke of Richmond (Master of Horse).
8. Duke of Devonshire (Lord Lieutenant of Ireland).
9. Duke of Newcastle (Secretary of State).
10. Earl of Pembroke (Groom of the Stole).
11. Earl of Isla (First Minister for Scotland).
12. Lord Harrington (Secretary of State).
13. Sir Robert Walpole (Chancellor of Exchequer).
14. Sir C. Wager (First Commissioner of the Admiralty).

Three were subsequently added to these, Sir John Norris, the Duke of Montagu (Master of the Ordnance), and the Duke of Bolton. 'The Duke

the Cabinet for the years 1737 and 1740; the one contains sixteen, the other fourteen names, and to this last three were subsequently added. The Archbishop of Canterbury, the Lord Chamberlain, the Groom of the Stole, and the Master of the Horse appear in each. These accounts are furnished by Lord Hardwicke in the first instance and Lord Hervey in the second, and each describes a smaller group—Walpole, the two Secretaries of State, and the Chancellor—meeting for the discussion and virtual settlement of policy. The formality, amounting to futility, of the meetings of the whole Cabinet Council is apparent in these memoirs. The business generally consisted in the verbal revision of some document the purport of which had been settled by the confidential servants of the King¹.

In 1754, when Henry Pelham died, the King was anxious to get the advice of the entire Cabinet as to the future conduct of public business, but the matter was practically settled by Hardwicke and Newcastle. The former wrote to the Archbishop to obtain his opinion, or rather to tell him what his opinion was desired to be; he informed the Archbishop that he need not attend personally, but must answer at once. A draft of the answer required was sent with the letter².

When George III came to the throne the number of titular Cabinet Councillors excited the mirth of Horace Walpole. The Duke of Leeds was removed from the Cofferer's place and made Justice in Eyre, 'but to break the fall, the Duke is made Cabinet Councillor, a rank that will soon become indistinct from Privy Councillor by growing as numerous³.'

of Bolton, without a right to it from his office of Captain of the Band of Pensioners, in which employment he succeeded the Duke of Montagu on his removal to the Ordnance, was likewise admitted to the Cabinet Council, because he had been of it seven years ago, at the time he was turned out of all his employments.' Hervey Memoirs, ii. 551.

¹ Hervey Memoirs, ii. 556-571.

² Life of Lord Hardwicke, ii. 512, 515, 516.

³ Walpole Letters, iii. 384. A few days later he writes, 'Lord Hardwicke is to be Poet Laureate, and according to usage I suppose it will be made a Cabinet Counsellor's place' (ibid. 386).

But these men took no part in the decision of policy. In the Grenville Ministry, which lasted from the spring of 1763 to the summer of 1765, the business of government was settled at weekly dinners at which only five or six Ministers were present. The Cabinet minutes record 'meetings of his Majesty's servants' at which Grenville, the First Lord of the Treasury, the two Secretaries of State, the President of the Council, and the Chancellor were alone present: sometimes this body is reinforced by Lord Mansfield, the Chief Justice. It is not easy to suppose that the number of honorary members of the Cabinet had diminished between 1760 and 1763, and there is other evidence to show that the Cabinet Ministers were of two sorts, efficient and honorary¹.

Illustrations of the distinction.

The distinction between the two groups was marked by the communication of important State papers to the 'efficient' Ministers.

When Lord Bute in 1762 was trying to drive the Duke of Newcastle from the Ministry by repeated slights, that which the Duke felt most keenly was a summons to a Cabinet Council to consider a declaration of war with Spain when no papers had been supplied to him by the Secretary of State, nor information as to the course which negotiations were taking. 'Even Mr. Pitt,' said the Duke, 'had that attention to me as constantly to send me his draughts with copies for my use, desiring me to make such alterations as I should think proper, before he produced them at the meeting of the King's servants².'

The circulation of papers.

Newcastle.

¹ Lord Lyttelton in April 1767 sent a list of a proposed Cabinet to G. Grenville. It consists of fourteen names. He says that he has mentioned 'only the principal Cabinet officers,' but the list includes the Lord Chamberlain and the Master of the Horse (Grenville Papers, iv. 8). The Chancellor of the Exchequer was not usually a member of the Cabinet unless that office was held together with the First Commissionership of the Treasury, but Charles Townshend teased Chatham into allowing him a place in the inner Cabinet, and when North succeeded him as Chancellor of the Exchequer the dearth of business capacity in the Ministry caused him to be summoned to the Cabinet at once. Grafton MS.

² Rockingham Memoirs, i. 103.

The same distinction is noticeable a few years later. The second Lord Hardwicke, when invited to become Secretary of State in Lord Rockingham's Ministry in 1766, declined to do so on the ground of health, but expressed his willingness to join the 'Cabinet Council *with the communication of papers*¹.' Shelburne described the Cabinet to Bentham as consisting of an outer circle and of the Cabinet *with the circulation*, that is, with access to important State papers sent round in Cabinet boxes to the inner circle of Ministers². Shelburne.

Again, in a debate of the year 1775 in the House of Lords, the former members of the Duke of Grafton's Ministry tried to free themselves from blame for the measures which had troubled our relations with the colonies. Lord Mansfield denied all responsibility, though he admitted that he had been a member of the Cabinet during the latter part of the reign of George II and the whole of the current reign. But he said that there was a 'nominal and efficient Cabinet,' and that he had ceased to be an efficient member from the close of the Grenville Ministry. In the same debate the Duke of Richmond told the House that 'the correspondence with our Foreign Ministers is sent round at a convenient time in little blue boxes to the *efficient* Cabinet Ministers, and that each of them gives his opinion on them in writing³.' Mansfield.

The confidential Cabinet was another term applied to the inner circle of Ministers who determined the policy of the country. When the Duke of Grafton was out of office in 1771 the King gave orders that he should be kept informed 'of all business of any importance that was in agitation⁴.' When he accepted the Privy Seal later in the same year, he did so on condition that he should not be summoned to meetings of the confidential Cabinet. George III agreed to this, remarking that Grafton 'had ever thought the

¹ Rockingham Memoirs, i. 330.² Bentham, ix. 218.³ Parl. Hist. xviii. 278.⁴ Grafton MS.

confidential Cabinet too numerous¹, and had, when Prime Minister himself, desired that Lord Bristol, who succeeded Chatham as Privy Seal in 1768, should not be summoned to the meetings of that body. But it seems clear that the King and Lord North expected to have Grafton's advice whenever they wanted it, and the Duke, whether in or out of office, appears to have occupied the position of a 'non-efficient' Cabinet Minister.

Opposi-
tion in
Cabinet.

One result of this distinction between efficient and non-efficient members of the Cabinet was that statesmen who had once been Cabinet Councillors considered themselves to remain within the outer circle of the Cabinet, even though their political opponents held the great offices of State.

Bath.

Thus, the Pelhams in 1745 finding themselves in a position to make terms with George II, insist that Lord Bath, who had always been their most active political opponent, 'should be out of the Cabinet Council²'.

Mansfield.

Still more noticeable is the position of Lord Mansfield as described by himself in 1775. He had been a member of the 'efficient Cabinet' down to the close of the Grenville Ministry. When Rockingham succeeded Grenville 'he had prayed his Majesty to excuse him: and from that day to the present day had declined to act as an efficient Cabinet Minister³.' His reason for refusing to act with the Cabinet when Rockingham came in was, as appears from his speech, that he was opposed to its policy, but he considered that he had never ceased to be a Cabinet Minister and was ready to give advice when asked.

This retention of Cabinet rank and position by men who had ceased to be in accord with those who were actually administering the affairs of the country must have been a constant source of insecurity to Ministries. There can be no doubt that it offered opening for intrigue to George III,

¹ Correspondence of George III and Lord North, i. p. 76.

² Coxe, Memoir of H. Pelham, i. 295.

³ Parl. Hist. xviii. 274, 275, 279.

who was never loyal to Ministers whom he disliked, and who held himself entitled to consult these titular Cabinet Ministers to the disadvantage of those who were doing the business of Government¹.

The disappearance of the titular external Cabinet must have been gradual. We hear nothing of it after Lord North's retirement in 1782. Not until 1801 do we find the rule laid down by Addington, that 'the number of Cabinet Ministers should not exceed that of the persons whose responsible situations in office require their being members of it'².

This statement was rendered necessary by the conduct of Lord Loughborough. When Addington succeeded to Pitt in 1801 the Great Seal was transferred from Loughborough to Eldon. But Loughborough did not consider that he thereby lost his seat in the Cabinet. He attended its meetings and retained his key of the boxes: but Addington soon wrote and informed him that he was no longer a member of the Cabinet, stating in the words quoted above, the limitation of the Cabinet to persons holding responsible office³.

So far I have tried to trace the development of the Cabinet. It begins as a political committee of the Privy Council, large and even indeterminate, often consisting of an inner group of responsible advisers and an outer circle of nominal members sometimes hostile to the responsible Ministers of the Crown: it is now and has been for the whole of this century a definite group of men who hold or have held high office, who share the same political opinions and are jointly responsible for their action⁴. They are no longer 'the lords of the Cabinet Council,' they are 'Her Majesty's servants,' and they are of

¹ Illustrations of this may be found in the numerous consultations between the king and ex-ministers which preceded the fall of the Grenville and Rockingham ministries in 1765 and 1766.

² Campbell, *Lives of the Chancellors*, vi. 327.

³ *Ibid.* 326-7.

⁴ Lord Salisbury's Cabinet of 1895 consists of 19 members. The size of Cabinets has been growing for some years past, and though the unity and responsibility of the entire Cabinet may remain unaffected, yet we may foresee under these conditions the break-up of the Cabinet into Committees for special purposes, and the formation of an inner circle of confidential advisers.

necessity Privy Councillors, for thus only are they bound by the obligations of the Councillor's Oath to advise the Queen and keep her Council secret.

§ 2. *The Collective Responsibility of the Cabinet.*

Collective
responsi-
bility
unknown.

Plainly a Cabinet which contained persons hostile to those who were carrying on the King's government could not be collectively responsible for the advice tendered to the King. Lord Bath would not have admitted his responsibility for the action of Newcastle and Pelham, nor Lord Mansfield for the action of the Rockingham Cabinet. But though collective responsibility in Cabinets thus constituted was impossible, one might have expected that among those who were professedly acting together the minority would have shown some loyalty to the majority. But this was not so.

Lord
Camden's
disavowal
of his
colleagues.

Lord Camden, who figures in history as a great judge and a patriot statesman, when the Duke of Grafton's Ministry was falling into discredit, took the opportunity of alleging that he had been an unwilling party to the action of his colleagues in the matters arising out of Wilkes' election for Middlesex. A few years later he repudiated all concern in the imposition of the tea duty on the American Colonies, and the Duke of Grafton while alleging that it was 'mean' of Lord Camden to try to evade liability for a measure which was consented to by the entire Cabinet, took occasion to say that 'it was no measure of his¹, though he was Prime Minister at the time.'

Party
disloyalty.

Party loyalty, as we understand the term, was practically unknown to politics in the middle of the eighteenth century. The King disliked it. He wanted ministers who would attend to the business of their respective departments, and who had no such common political interests as would lead them to combine in insisting upon any scheme of home or foreign

¹ Parl. Hist. xviii. 273.

policy. Hence throughout the reign of George II and the first part of the reign of George III we find constantly expressed the King's desire for a Ministry 'on a broad bottom,' that is, a Ministry of various political opinions. And there was a lack of definite political issues dividing parties. Groups formed around one or other of the peers who commanded enough Parliamentary votes to give them political importance. The Grenville, the Bedford, and the Rockingham connections, the admirers and followers of the elder Pitt, and a few lawyers and smart debaters who took their services to the best market, made up the House of Commons of those days. The Rockingham Whigs alone insisted that if they were to take office at all they must come in as a party and enjoy the exclusive confidence of the King. This confidence they never obtained, and the Rockingham Ministries form two very brief episodes in the political history of the eighteenth century.

But there was another reason, of quite a different character, for the disjointed condition of eighteenth-century Cabinets. Ministerial responsibility meant to the statesmen of the last century something different from what it means to us. To them it meant legal responsibility, liability to impeachment: to us it means responsibility to public opinion, liability to loss of office. Legal responsibility could not fairly be fixed upon a Cabinet for the action of one of its members, and this comes out clearly in a debate which took place in 1806, on the acceptance by Lord Ellenborough, the Chief Justice of the King's Bench, of a place in the Cabinet. Exception was taken to the appointment on the ground that the Chief Justice might be responsible, as a member of the Cabinet, for the institution of legal proceedings over which he might have to preside as a judge. The supporters of the Government contended against this theory of the responsibility of every member of the Cabinet for the acts of the whole body, maintaining that each was responsible for his own department. 'The Cabinet was not responsible as a Cabinet,' said Lord Temple, 'but the Ministers were responsible as the

Legal
and moral
responsi-
bility not
disting-
uished.

Responsi-
bility
meant

liability to
impeach-
ment :

means
now loss
of office.

Unan-
imity of
advice to
Crown.

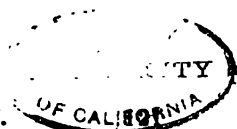
Of gradual
growth.

officers of the Crown': and Fox maintained that there was a practical advantage in taking responsibility off the Cabinet and fixing it upon an individual official. 'The immediate actor can always be got at in a way that is very plain, easy and direct, compared to that by which you may be able to reach his advisers¹.' It is very noticeable that Mr. Hallam, writing in 1827, takes the same view of Cabinet responsibility². We do not now fear that Ministers will break the law, so much as that they will mismanage our affairs; they act under close and constant criticism, and since loss of office and of public esteem is the only penalty which Ministers pay for political failure, it is possible to insist that the action of the Cabinet is the action of each and every member of the Cabinet. If a Minister differs from his colleagues, he must resign, or else must be held responsible for their action; he cannot be allowed, like Lord Camden, to retain office and emolument, and afterwards repudiate the action of those with whom he sat in Council.

Another aspect of the joint responsibility which the Cabinet owes to the public, is seen in the unanimity of the advice which it should offer to the Crown. Here we are again met throughout the last century by the difficulty arising from the existence of a non-efficient group of Cabinet Ministers, who as they were not parties to the advice actually tendered, could not be bound by its tenour. That a body of Ministers should agree in the advice which they offered to the King, was a matter for self-congratulation. Lord Hardwicke describes with satisfaction some meetings of the Ministry of Pitt and Newcastle, in the midst of a great war, when

¹ Cobbett, *Parl. Debates*, vi. 308, 311.

² Hallam, *Hist.* iii. 187, note. 'I cannot possibly comprehend how an article of impeachment, for sitting as a Cabinet Minister, could be drawn; nor do I conceive that a privy councillor has a right to resign his place at the board, or even to absent himself when summoned; so that it would be highly unjust and illegal to presume a participation in culpable measures from the mere circumstance of belonging to it. Even if notoriety be a ground, as has been sometimes contended, for impeachment, it cannot be sufficient for conviction.'



they differed violently, but composed their differences 'for the sake of preserving unanimity in the King's Council ¹.'

The question whether the Crown should be made aware of dissentient opinions among its advisers must be a matter of Cabinet etiquette, but the experience of Lord Grey and William IV points to a disadvantage which attends the giving such information to the Crown. When the Reform Bill of 1832 had been committed in the House of Lords, an amendment to the Bill was carried which the Government considered fatal to the measure. The Cabinet thereupon pressed upon the King the expediency of creating peers in sufficient numbers to ensure the success of the Bill. From this opinion the Duke of Richmond dissented, and his dissent was recorded in the Cabinet minute submitted to the King ². Soon after this the King and his Ministers differed as to the proposed creation of Peers, and the Ministry resigned. The Duke of Wellington endeavoured to form a Ministry, and in order that he might be in full possession of the circumstances under which he was taking office, the communications which had passed between the King and his late Ministers were placed in his hands. The Duke gave up his attempt, and Lord Grey returned to office; but the formal record of dissentient opinion in the Ministry was used to its disadvantage in subsequent debates. Lord Grey complained of this to the King, but it is clear from the King's answer that the fault lay in the Cabinet minute which informed the King that his advisers were not unanimous ³.

Closely connected with what has gone before is the secrecy which is imposed upon Cabinet Ministers as to the matters passing in the Cabinet. Formally this depends on the oath of the Privy Councillor, but the obligation does not always seem to have been regarded as binding. The members of the Grafton Ministry, 1767-1770, were quite ready to announce

Its im-
portance.

Lord Grey
and Wil-
liam IV.

Secrecy of
Cabinet
Councils,

for a long
time unre-
cognized.

¹ Life of Lord Hardwicke, iii. 248.

² Corresp. of Will. IV and Earl Grey, ii. 395.

³ Corresp. of Will. IV and Lord Grey, ii. 424, 431.

the part they had taken in Cabinet discussions on the expulsion of Wilkes and the taxation of the American Colonies.

Duke of Grafton. According to modern rule, no record is kept of transactions in the Cabinet, unless when a decision is submitted to the King in the form of a Cabinet minute. When George III dismissed Lord Grenville's Ministry because they differed from him on the removal of Roman Catholic disabilities, Cabinet minutes are said by Lord Grey to have been 'very freely and not very fairly produced'.¹ Certainly Lord Grenville sent to the Speaker copies of a Cabinet minute of the King's answer and of the Cabinet's reply². Perhaps the growth of the ideas of joint responsibility to the public for action and of unanimity in respect of the advice given to the Crown may have done more than the Privy Councillor's oath to enforce that secrecy which is a part of the loyalty due from a minister to his colleagues³.

Disclosures of Cabinet discussions are never now made without the permission of the Sovereign. It is the practice that this permission should be obtained through the intervention of the Prime Minister, and that the disclosure should be strictly limited by the terms of the permission granted⁴.

Lord Melbourne.

The obligation and its reasons are clearly stated by Lord Melbourne, in remonstrating with William IV for having, as he supposed, permitted Lord John Russell to disclose the purport of discussions in the Cabinet. 'What Minister will

¹ Melbourne Papers, 247.

² Lord Colchester's Diary, ii. 108.

³ An Order of the Queen in Council, 4th Feb. 1878, reaffirming rules laid down in 1627, enjoins that 'no disclosure be made touching the matters treated of in Councils, and no publication made by any man how the particular voices went.' Whether this applies to Cabinet discussions I do not know. Lord Selborne in his pamphlet *Judicial Procedure of the Privy Council* upholding the antiquity and propriety of this rule in other business of the Council, makes no allusion to the Cabinet. The Greville Memoirs for the last years of the Melbourne Ministry contain abundant proof that some member of the Cabinet confided to the Clerk of the Council very full accounts of what passed at Cabinet meetings. Greville, *Memoirs*, iv. 308, 320, 325.

⁴ Hansard, ccciv. 1186.

ever hereafter give his opinion freely and unreservedly upon the matters before him if he feels that he is liable, at any distance of time, to have those opinions brought to light, and to be himself arraigned at the bar of the public for having held them; and how can the public affairs be satisfactorily conducted unless the sentiments of Ministers be declared in their fullest extent, and without the least bias either of apprehension or precaution¹?

§ 3. *The relations of the Cabinet to the Prime Minister and the Crown.*

The existence of a Prime Minister may be said to date from the disappearance of the King from the Cabinet Council.

Prime Minister a modern institution,

We are accustomed to regard a Prime Minister as a necessity of our constitution, and we understand the term to mean the party leader whom the Queen has invited to form a Ministry, in the assurance that his followers are sufficiently numerous, and sufficiently loyal, to secure support for the measures which he may recommend to the Crown and to Parliament.

But the Statesmen whom we are wont to call Prime Ministers, between 1660 and 1714, had no such powers as to the choice of their colleagues or the support of their measures.

unknown in seventeenth century.

The title itself was unknown till the commencement of the eighteenth century. Ormond suggested to Clarendon, in 1661, that he should give up office and confine himself to advising the King on questions of general policy. Clarendon declined to enjoy a pension out of the Exchequer 'under no other title or pretence but of being *first Minister*, a title so newly translated out of French into English, that it was not enough understood to be liked, and every man would detest it for the burden it was attended with².'

¹ Melbourne Papers, 215.

² Clarendon, Autobiography, i. 420. In Sir John Reresby's Memoirs (ed. Cartwright) Clarendon is spoken of as 'the Great Minister of State,' p. 53. Buckingham, as 'the Principal Minister of State,' pp. 76, 81. Danby, as 'the Chief Minister,' p. 168.

Clarendon and Charles II. The suggestion shows the estimate formed of Clarendon's position by his contemporaries, and that he was, in point of power and influence, what passed for a Prime Minister in those times. But Clarendon had not the choice of his colleagues; the inner Council of Advisers was increased by the introduction of Ashley, and later of Coventry, without his concurrence¹, and without consulting him. Charles made Bennet Secretary of State². Nor had Clarendon a decisive voice in measures which should be submitted by members of this inner Council to Parliament³.

Sunderland and William III. No one corresponding to a Prime Minister could be said to have existed throughout the reign of William III. The celebrated Whig Ministry of William III had no recognized leader. Burnet speaks of the management of the King's affairs, for parliamentary purposes, as being in the hands of Sunderland from 1693 to 1698⁴. Sunderland was too unpopular in the country to take any prominent part in public affairs, in fact he only accepted the office of Lord Chamberlain in 1697, and held it for a year. It is significant that he was frightened into retirement by the wrath of the Whig junto at the appointment of Vernon as Secretary of State by the King, on his advice⁵, and without consulting any other Ministers.

Godolphin and Anne. Nor can it be said that throughout the reign of Anne any Minister had the commanding position which we associate with the Premier. Godolphin, by slow degrees, ousted his rivals, Harley and St. John, from the Cabinet, and when Anne determined once more to employ the Tory advisers who really possessed her confidence, Godolphin bore the dismissal of his friends and the appointment of his foes, without seeming to consider that his own retirement was thereby rendered imperative.

¹ Clarendon, *Autobiography*, ii. 344, 460.

² *Ibid.* ii. 226.

³ *Ibid.* ii. 344-349.

⁴ Burnet, *History of his own Time*, iv. 207, 208, and notes.

⁵ Macaulay, viii. 20.

Harley is repeatedly described by Swift as first Minister¹, ^{Harley and Anne.} or chief Minister, and it is in the writings of Swift that we first find the term Prime Minister². But Harley did not choose his own colleagues, nor could he exclude from the Cabinet persons opposed to his policy³. His reluctance to push measures to an extremity with his opponents, by insisting on their removal from all political office, caused something like a rebellion in his own camp. The October Club wanted a Prime Minister of their own choosing, and a full share of the spoils of victory; the Queen was not prepared to admit that any one ruled but herself. Harley stood between a party who wanted much, and a mistress who would concede little; he had not at his command the party-discipline, now at the command of a party-leader, which would have enabled him to put constraint on the Queen, nor the full confidence, now accorded to a Prime Minister, which would have enabled him to satisfy the demands of his party.

Walpole was the first Prime Minister in the modern sense ^{Walpole,} of the word. It is true that he differed in many respects as to the extent and the sources of his power from the Prime Ministers of the present day. Within the Cabinet there was often a fierce struggle for predominance. Carteret sat there for nine years. For the first three he was a formidable rival as Secretary of State; for the last six he was a malcontent colleague, prepared to take every opportunity of weakening the power of the First Lord of the Treasury. Townshend, during the last months of his tenure of office as Secretary of State, struggled hard to displace Walpole. ^{his struggles with colleagues,} Nor was Walpole ever invited by the King, as a modern Prime Minister is invited, to form a Ministry of persons who will act harmoniously with him. He entered the Cabinet as a man of

¹ Memoirs relating to change in the Queen's Ministry, Swift, xv. 24.

² Enquiry into the behaviour of the Queen's last Ministry, Swift, xvi. 19, and again in the preface to the History of the last four years of Queen Anne, p. 38, we find the term used with a recognition of its novelty, 'those who are now called prime ministers.'

³ Ibid. xv. 61.

acknowledged political eminence, joining a body of men with whom he was in agreement on the chief questions of the time, and he established himself as Prime Minister by the gradual expulsion of those who were inclined to dispute his pre-eminence.

sources of
his power,
royal
favour,

The sources of his power were two: the favour of George II, and the compact working majority which he possessed in the House of Commons.

manage-
ment of
Parlia-
ment;

The first he enjoyed by reason of the influence which he acquired over the mind of Queen Caroline. The second was obtained and kept together by methods which we need not here discuss¹. One thing is clear: if Walpole could have relied on its independent support he would have resigned more than once in the course of his ministry, in order to show to the King and Pulteney that he was master of the situation. His majority was kept together by the favours, present and prospective, which only a Minister could dispense.

his prac-
tical su-
premaccy,

He was a Prime Minister in fact, because his will controlled the policy of the country. His colleagues were men of his own choice whom he induced the King to accept as ministers, and he commanded a majority in a parliament which was corrupt and had ceased to be truly representative—a majority which he commanded so long as he retained the power to reward it. But to the popular mind a Prime Minister was not the leader indicated by the popular choice, but the creature of royal favour. Hence it was charged against

¹ Mr. Morley (*English Statesmen, Walpole, 121-129*) has tried hard to exonerate Walpole from charges which have remained practically unanswered for more than a century: but the circumstantial evidence is almost irresistible. Mr. Edgumbe and Lord Isla had managed respectively the Cornish and Scotch constituencies, the former was opportunely raised to the Peerage, and both pleaded privilege and refused to answer before the Committee of Inquiry. So did Paxton the Solicitor to the Treasury, though he was sent to Newgate for his refusal. And what are we to make of Walpole's advice, when out of office, to Henry Pelham: 'you must be understood by those that you are to depend upon; and if it be possible they must be persuaded to keep their own secret.' Coxe's Pelham, i. 93.

Walpole that he was 'sole Minister' and 'prime vizier',¹ his disavowal of the title. and hence his indignant repudiation of the charge, and his statement by way of defence, that he was only one of the King's Council, and had no more voice in the direction of affairs than any other member of the Cabinet.

I have dwelt thus on the position of Walpole because he illustrates the difference between the Prime Ministers of the last century and the Prime Minister of to-day; because, too, his power gives a forecast of the coming change in the fact that it rested not wholly on royal favour, but greatly also on the majority in the House of Commons, which he was able to control, though not to trust.

A few years after Walpole's fall the arts of Parliamentary management had so far progressed that the Pelhams were able to put pressure on the King to admit William Pitt to office. They and their friends resigned in a body, and left no possible Minister acceptable at once to the King and the majority of the Commons². The Pelhams and the Court.

When George III tried to meddle not only with the composition of Cabinets and the direction of policy, but with Parliamentary management, the Whigs drew together and formed a party whose connecting link was resistance to royal influence, who claimed, if they were to serve the King at all, to nominate their leader as Prime Minister, to work together under a Ministry which should consist exclusively of Whigs, and to enjoy the King's exclusive confidence³. This right of a party to nominate its leader, and if it came into power to require his acceptance by the King as Prime Minister, was bitterly disputed by George III. And while the King disputed the claim of a successful party to nominate a Prime Minister, politicians were not always ready to admit the need of such a personage. George III and the Whigs;
they claim to choose their leader,

¹ Parl. Hist. xi. 1380, and see the protest of the dissentient Lords on the rejection of the motion to remove Sir R. Walpole. 'Because we are persuaded that a sole or even a first Minister is an officer unknown to the law of Britain, inconsistent with the constitution of this country, and destructive of liberty in any government whatever.'

² Coxe, *Memoirs of H. Pelham*, i. 289. ³ *Stapylton, Canning*, 203-208.

but a
Prime
Minister
not recog-
nized as
necessary

till Pitt's
time.

In 1783 the Duke of Grafton when asked to join Lord Shelburne's Ministry told Shelburne that he would not consider him as Prime Minister¹, but only as holding the principal office in the Cabinet. In the Coalition Ministry which succeeded Shelburne, the Duke of Portland was placed at the Treasury, while Fox and North shared the practical control of affairs. A similar arrangement was proposed in 1803 by Addington to Pitt, the proposal being conveyed by Dundas. Addington thought it possible that he and Pitt might be Secretaries of State, with a First Lord of the Treasury of no political importance, and that there should be no Prime Minister. But Pitt had been for seventeen years a Prime Minister in the modern sense of the word, possessing the full confidence of the King, and working with a Cabinet in which his supremacy was undoubted. He told Dundas that it was 'an absolute necessity in the conduct of the affairs of this country that there should be an avowed and real Minister possessing the chief weight in the Council and the principal place in the confidence of the King. That power must rest in the person generally called First Minister².'

Conditions
of Pre-
miership
before
1832.

It may be said then that before 1832 it was essential to the position of a Prime Minister, firstly, that he should hold the 'principal place in the confidence of the King,' and next and following from it, that he should possess 'the chief weight in the Council.' The second of these requirements followed upon the first, because unless the Prime Minister possessed the King's full confidence he might be fettered in the choice of his colleagues, or they might embarrass his action by dissent or intrigue. A King such as George III might even use his Parliamentary influence to overthrow a Minister and a Cabinet loyal to one another but unacceptable to himself.

But since the extension of the franchise which began in 1832, the Prime Minister has become more and more the

¹ Fitzmaurice, *Life of Shelburne*, iii. 343.

² Stanhope, *Life of Pitt*, iv. 24.

direct choice of the people, as the House of Commons has become more and more the reflection or the mouthpiece of popular opinion. It is obvious that when the result of a general election sends to the House of Commons a large majority of members bound by promises to their constituents to support the policy of some one individual statesman, the relations of such a man with the Crown, with his colleagues, with the majority which supports him in the House of Commons, are very different to those of a Minister of the last century, who in the last resort could only appeal to nomination boroughs or close corporations, or at the best to county constituencies seldom stirred to a vivid interest in political affairs.

Increased
importance of
post.

But enough has been said to indicate the growth of the idea that a Prime Minister, though unknown to our constitutional law, is a necessary part of our constitutional conventions. We should now regard the actual relations of the Prime Minister to the Crown and to his colleagues.

The Prime Minister is commonly said to have the power of choosing his colleagues and of dismissing them, but this must be understood with reservations. When a general election has shown that the electors desire one man above all others to guide the policy of the State, and have returned a large majority of members pledged to support him, the power which is placed by the Crown in the hands of such a man can be freely used. The prominent members of his party are at his disposal, his government can survive defections, and the expression of his opinion is authoritative. If the electorate are indifferent as to which of two or more party leaders shall control the counsels of the party, the discretionary powers of the Crown are exercised with greater freedom. The Prime Minister selected must manage as well as rule his subordinates. When we say that a Prime Minister can dismiss a colleague, we mean no more than this, that a strong Premier can say to the Queen, 'He or I must go.'

His relation to his colleagues.

Limits of his power over them,

The ultimate test of the strength of a Prime Minister or of a subordinate is always this, 'Can the Government get on without him?'

depends
on their
relative
import-
ance.

A Minister may retire from office voluntarily because he differs from the policy of the Prime Minister and his colleagues, as did Mr. Bright in 1882, and the Government may retain its strength unimpaired.

A Minister may retire from office involuntarily because he will not subordinate his views to those of his chief, as did Lord Palmerston in 1851. Lord John Russell was then compelled to tell the Queen that he could no longer serve with Lord Palmerston. The latter was requested to give up the seals of office, but the Ministry did not long survive his loss.

Or the retiring Minister may be of such importance to his colleagues and his party that the Prime Minister may feel it impossible to carry on Government without his aid; such was the case of Lord Althorp in 1834, whose resignation of office as Chancellor of the Exchequer and leader of the House of Commons brought about the retirement of Lord Grey.

I have chosen these three instances of eminent men leaving a Ministry, voluntarily or otherwise, because they show that the Prime Minister is, after all, a Minister standing in some special relations to the Crown and to his colleagues, but depending for his pre-eminence upon his personal qualities and his personal exertions.

His rela-
tion to the
Crown.

The Prime Minister is the channel of communication between the collective Cabinet and the Crown¹, but every Minister has a right, as a confidential servant of the Crown, to state the business of his department in the Royal presence,

¹ Such communications were formerly made through a Secretary of State, a survival of the Tudor arrangements. Grenville Corresp. iii. 16, note; and see Burnet, *Hist. Reformation*, v. 117: but the practice has been such as is described for more than a century.

without the interposition of the Prime Minister¹. No loyal colleague would in his communications with the Sovereign ^{The channel of communication,} open matter of novelty or importance which had not previously been discussed with the Prime Minister, or, if need be, with the entire Cabinet; for the Prime Minister exercises a general superintendence over all the departments of Government.

But a Prime Minister does not allow business peculiar to the department of one of his colleagues to be first submitted to himself. Lord Melbourne returned to the Austrian Ambassador despatches addressed to him as Prime Minister, ^{but not to exclude his colleagues.} which should have been sent to Lord Palmerston as Foreign Secretary. 'The forms of the English Government,' he said, 'have marked out the Secretary of State for Foreign Affairs as the Minister to whom all correspondence from foreign powers ought to be addressed².' If the Prime Minister does not interfere in the departments of his colleagues, save by way of general superintendence, it is still more improper that any other Minister should do so. One of the gravest charges contained in the letter in which Lord Melbourne condemned Lord Brougham to political extinction was that Lord Brougham as Chancellor had interfered in the business of the Irish Office, without communication either with the Prime Minister or the Home Secretary, in whose province the matter lay³.

But though the Prime Minister does not interpose between his colleagues and their Sovereign in the business of their departments, it seems customary that he should intervene to save them from the consequences of neglect or indiscretion, and should smooth over possible difficulties. ^{His duties to them.}

Thus Lord Grey remonstrates with William IV, because 'His Majesty's manner to Lord Durham has not been

¹ See Mr. Gladstone's criticism on the temporary arrangement by which Lord Palmerston's despatches were communicated to the Queen by Lord John Russell, *Gleanings of Past Years*, i. 86. *English Church Quarterly Review*, Jan. 1877.

² Melbourne Papers, 340.

³ Melbourne Papers, 261, 262.

marked with the same kindness that he has shown to his other servants¹. Lord Melbourne, after a protest against the very unjustifiable action of Lord John Russell, who had asked permission to disclose Cabinet discussions without previously consulting his leader, is careful to assure the King that Lord John acted through 'indiscretion or misconception, as he is utterly incapable of anything of a clandestine character².'

In the same spirit he replies to a letter of censure which the King desired him to forward to Lord Palmerston; he takes full responsibility for the matter complained of, and 'feels himself to labour under the whole of that disapprobation which your Majesty is pleased to express of the conduct of Lord Palmerston.'

It remains to note the relations between the collective Cabinet and the Crown,

The King's servants entitled to his confidence.

The Ministers of the Crown are entitled to its full confidence, and this means, first, that the Sovereign shall not seek or take advice from others in matters of State unknown to them; next, that he shall not give public expression to opinions on matters of State unadvised by them; and lastly, that he shall give them proof of his confidence by the acceptance of their advice, not only as to the measures of government, but in other ways, and especially as to the persons who shall fill offices in the royal gift.

(a) He should not consult others,

The first of these statements may be illustrated from a passage in the history of Lord Grey's Ministry. The Duke of Wellington addressed the King directly on the subject of the arming of political societies at a time when the excitement occasioned by the discussions on the Reform Bill caused anxiety as to the maintenance of order. The King replied; and from the correspondence which passed between the King, his private secretary, and Lord Grey, it appears that the Cabinet, although assured that the King's communication

¹ Corresp. of Will. IV and Earl Grey, ii. 201.

² Melbourne Papers, 219.

with the Duke did not indicate any want of confidence in them, regarded it as unconstitutional. Lord Grey writes 'that it might produce inconvenience if His Majesty were to express opinions to any one but his confidential servants in matters which may come under their consideration ¹,' and the King promises that his answer to such communications in future shall be confined to a mere acknowledgement of their receipt.

The second is illustrated by an episode in the Melbourne Administration. William IV, on the occasion of Sir C. Grey being sworn of the Privy Council as a member of the Canadian Commission, referred unmistakably and in severe terms to advice which he had received from the Secretary of State for the Colonies. The Cabinet sent a remonstrance to the King for having done that which might 'have the effect of hereafter restraining the freedom of that advice which it is the duty of every one of your Majesty's confidential servants to offer to your Majesty without reserve ².'

The third and last proposition which I laid down might admit of much explanation and illustration, for there is much that the Sovereign can do, sometimes of a merely formal and social character, to strengthen the position of his Ministers at a critical time.

The history of the Reform Bill of 1832 affords abundant evidence of this. Lord Grey thought that the King by refusing to dine in the City weakened the position of his Ministers, but in graver matters he stood staunchly by them. The exercise of the prerogative of dissolving Parliament, the gradual dismissal of all persons about the Court who were hostile to the Bill, the personal influence exercised by the King upon the bishops and lay peers who were thought to be wavering, the proposed creation of peerages, the letters addressed by the King's command—unknown to his Ministers but in their interest—to the Tory Peers urging abstinence

¹ Corresp. of Will. IV and Lord Grey, i. 413-424.

² Melbourne Papers, 335.

from opposition, all these modes of supporting his Ministers by practical aid and by the display of confidence were used by William IV.

or to
dismiss
mutineers.

The dismissal of holders of political offices who oppose or do not support Ministers in matters which are not open questions has, since the reign of George III, or it may be said since the Ministry of the younger Pitt¹, been a proof of royal confidence which a Cabinet is entitled to demand. Officers in the army and navy have held their commissions irrespective of political opinion ever since the dismissal of General Conway in 1764. Members of the permanent Civil Service are incapacitated by law from sitting in Parliament and by custom exempt from political changes. The offices of the Household, especially those held by ladies, have been an open question down to recent times. It seems now to be settled that 'great offices of the Court and situations in the Household held by Members of Parliament, should be included in the political arrangements made on a change of administration².' As regards the ladies of the Household, whose position gave rise to the well-known 'Bed-Chamber Question' in 1839, the arrangement seems to be that 'the Mistress of the Robes, who is only an attendant on great occasions, changes with the Ministry. The Ladies in Waiting, who, by virtue of their office, enjoy much more of personal contact with the Sovereign, are appointed and continue in their appointments without regard to the political connections of their husbands³.'

Political
and semi-
political
offices.

So far as to the treatment which a Cabinet may fairly expect from the Crown. The Sovereign in turn is entitled to something more than diligent service and respect. Ministers ought not, as it would seem, to initiate any important

¹ Rockingham complained in vain of the hostility or lukewarm support of the members of the King's household in Parliament; but Pitt procured the dismissal of the false and insubordinate Chancellor, Thurlow. Rockingham Memoirs, i. 294, 299. Stanhope, Life of Pitt, ii. 149.

² Minutes of Melbourne's Cabinet. Hansard, 3rd Ser. xlvii. 1001.

³ Mr. Gladstone, Gleanings of Past Years, i. 40.

business, whether it relate to legislation or to executive government, or to a change of administrators, without previous communication with the Sovereign.

Pitt suffered from the impression created in the mind of George III that he had matured a scheme for the removal of Roman Catholic disabilities before he had submitted it to the King¹. In like manner William IV expressed his surprise that a Bill for abolishing capital punishment in certain cases had been introduced, as he supposed, by his Ministers without his approbation. It was explained to him that the measure in question was a private member's Bill, which Lord Althorp, who led the Government in the House of Commons, had supported in the legitimate exercise of his private judgement². Duties of
Cabinet to
King.

The necessity of informing the Sovereign on all important measures of the Executive is best illustrated by the circumstances which brought about Lord Palmerston's retirement in 1851, and the memorandum communicated to him by the Queen through the Prime Minister as to the duty of the Secretary of State for Foreign Affairs³. It was in these words:—

‘The Queen desires, first, that Lord Palmerston will distinctly state what he proposes in a given case, in order that the Queen may know as distinctly to what she is giving her royal sanction. Secondly, having once given her sanction to a measure, that it be not arbitrarily altered or modified by the Minister. Such an act she must consider as failing in sincerity towards the Crown, and justly to be visited by the exercise of her constitutional right of dismissing that Minister. She expects to be kept informed of what passes between him and the foreign ministers, before important decisions are taken, based upon that intercourse; to receive the foreign despatches in good time, and to have the drafts for her approval sent to her in sufficient time to make herself acquainted with their contents before they must be sent off.’

Nor is the liability of Ministers to keep the Crown informed on political questions limited to executive action.

¹ Stanhope, *Life of Pitt*, iii. 268.

² Corresp. of Lord Grey and Will. IV, ii. 458, 459. ³ Hansard, cxix. 90.

The Leader of either House of Parliament must send to the Queen at the close of every day's business an account of what has passed.

Suggested changes in administration may begin in so vague and tentative a manner that it is hard to say at what point communication with the King becomes imperative. It is clear that the negotiations which Addington conducted with Pitt in 1804 went further than George III considered to be justifiable, and it would certainly seem right that when the confidential servants of the Crown contemplate a change in the character of the administration, the Sovereign should have early knowledge of the matter.

§ 4. *The Dependence of the Cabinet upon the House of Commons.*

It remains to consider the dependence of the Cabinet upon Parliament.

In this respect we are apt to carry back into the history of the last century theories which are only appropriate to the practice of our own day.

Cabinet
not wholly
dependent
on
Commons
before
1832.

The Cabinet represents the dominant political party; the Prime Minister is the foremost man of that party, chosen by the Crown, on the assumption that the party will follow him, and that its leaders will serve under him. The advice of the Cabinet, tendered through the Prime Minister, is advice which a majority of the House of Commons is certain, or at any rate likely, to approve; otherwise the Cabinet will be unable to retain office. But this theory of the constitution, though it seems to have existed in a manner since the accession of George I, was often very remote from the practice. We must not imagine that constituencies were always eager, well informed and uncorrupt, that the House of Commons was always really representative of such constituencies, that parties were always well defined, and that the Crown always loyally accepted the decision of the people and of Parliament as to the party which should govern and the men who should guide. Throughout the greater part of the last century these

conditions were inadequately fulfilled. The public was often apathetic on political questions: the House of Commons was not representative of public opinion: nomination boroughs and constituencies subject to influence of one sort or another gave a large control over the representation of the House to great landowners, to the Crown, or the Government of the day. Thus it was that, in the absence of political interests and of party divisions based on such interests, an adroit Parliamentary manager might keep a majority together although, like Walpole, he had fallen under the cordial dislike of the people, or, like Newcastle, had never attracted their attention. For the same reasons it was possible for George III, who busied himself in matters of patronage and corruption, to make, keep, or destroy a majority for any Ministry.

To enforce joint responsibility upon a body of Ministers it is necessary either that the Ministers themselves should be cordially agreed on certain lines of policy, and loyal to one another, or that they should represent a party which will enforce its policy upon its nominees. No King who aimed at personal influence would desire that his Ministers should represent a compact body of opinion, adverse perhaps to his own. George III not only desired to rule, but saw how the apathy of the country and the self-interest of public men made it possible for him to enjoy the reality of power.

In truth, although no Ministry could get on without a Parliamentary majority, almost any Ministry could command such a majority as would enable it to hold office, unless the King intervened. The great displays of public opinion at general elections, in 1784, in 1807, and in 1831 all served to confirm in office an existing Ministry. The ultimate legal sanction which the House of Commons can bring to bear on a Ministry of which it disapproves, the refusal to pass the Mutiny Act or grant supplies, has never in fact been applied. The only Ministers before 1830 who resigned in consequence of defeats in the House of Commons were Sir Robert Walpole in 1741, and Lord Shelburne in 1783.

Causes of
fall of
ministers.

But from 1830 to 1867 a defeat in the House of Commons, on what the Cabinet has chosen to regard as a vital issue, has been the ordinary mode of terminating the existence of a Ministry. Since 1867 there have been eight changes of Ministry; on four of these occasions Ministers have resigned, not because they were defeated in the House of Commons, but because the verdict of the constituencies at a general election had been given decidedly against them¹. The power which determines the existence and extinction of Cabinets has shifted first from the Crown to the Commons, and then from the Commons to the country.

Change of
opinion as
to duties of
ministers.

During the first of these three periods it was not expected of a Ministry that they should do more than administer. The defeat which drove Walpole from power took place in a committee of the House sitting to hear an election petition. Shelburne was beaten on a vote of approval of the Peace of Versailles. There is no instance before 1830 of a Ministry retiring because it was beaten on a question of legislation², or even of taxation. So late as 1841 Macaulay maintained in the House of Commons, speaking as a Cabinet Minister, that a Government was not bound to resign because it 'could not carry legislative changes, except in particular cases, where they were convinced that without such and such a law, they could not carry on the public service.' Legislation which Ministers might need for administrative purposes was the only sort of legislation about which, in the opinion of the Melbourne Cabinet, a government need feel sensitive.

Increase
of political
interest.

But in the last fifty years political interest has greatly increased, and extensions of the Franchise have made the

¹ It was made a matter of reproach to Lord Salisbury's Ministry in 1892, that being in an apparent minority of forty on the result of a general election, they did not resign at once, but awaited an adverse vote in the House of Commons.

² Chatham was defeated on the Ways and Means of the year and on the proposed land tax, and Pitt on commercial policy with Ireland, Parliamentary reform, and national defence. Massey, i. 307. Stanhope, Life of Pitt, i. 254, 272, 275, 288. Todd (Parl. Government in England, i. 253 *et seq.*) tabulates the causes of the fall of ministries since 1782.

House of Commons a close reflection of the opinion of the country. This opinion is often formed and expressed in favour of large measures of legislation. A Ministry which cannot command a loyal and a substantial majority cannot in such respects satisfy the expectations of the country, and if it should fail to satisfy these expectations by negligence or mismanagement the electorate will visit these shortcomings on the supporters of the defaulting Ministry. Again, with increased political interest has come a more precise definition of party lines and a more close insistence by constituencies that their members shall support the men, or the measures, which the constituencies prefer. Hence the result of a general election is a clear indication of the mode in which the majority of the House will vote on the important topics of the day, and political leaders need not waste time in testing the independence or docility of members by taking a vote in the House of Commons. And hence the change since 1867, and the reason why between 1832 and 1867 Ministries waited for the verdict of the division lobby, while since 1867 they have usually been ready to accept the verdict of the polling booth.

The duty of Ministers in respect of the business of Parlia-
ment is rendered more exacting by their increased dependence
on a Parliamentary majority. By the rules of the House of
Commons, demands for public money can only be made by
Ministers of the Crown: and those Ministers who are placed
at the head of the great spending departments are responsible
for estimating, obtaining, and expending the sums needed for
the services of the year. Every important measure of legisla-
tion is now brought forward on the responsibility of the
Cabinet, and the duty of introducing a measure to the House,
and of defending its provisions during its progress through
the House, is assigned to an individual Minister. If the
Prime Minister is in the Commons he is the 'Leader of the
House'; if not, the duties of Leader fall upon the most dis-
tinguished of his colleagues who is a commoner.

Arrange-
ment of
parlia-
mentary
business.

The House of Lords has also its Leader, and in each House
Leader of
the House.

the Leader is responsible for the arrangement and conduct of business. But the duties of Leader of the House of Commons are of a most exacting character. He has to satisfy a constant demand for legislation, he encounters the efforts of members of the opposite party to question, to criticize, and to embarrass the action of the Ministry, and under these disadvantages he arranges not merely that necessary business should be done, and necessary legislation effected, but that every matter of genuine current interest should be discussed if the House desire to discuss it.

SECTION IV.

THE HOUSE OF LORDS AND THE PRIVY COUNCIL AS COUNCILLORS OF THE CROWN.

§ 1. *The House of Lords.*

The House
of Lords
as a
Council.

The House of Lords is still, in theory, a Council of the Crown. The peers have never been summoned in this capacity since 1688, but their historical rights are preserved in two ways.

Form of
writ.

The writ of summons addressed to the temporal and spiritual peers is a call 'to treat and give council'; the judges and law officers are summoned to attend them; whereas the Commons, before the Ballot Act reduced the writ to a form, were summoned to 'do and consent to such things, as by the said Common Council . . . shall happen to be ordained ¹.'

Privilege
of access to
Sovereign.

It is the privilege of each individual peer to have audience of the Sovereign. Such a right was freely exercised in the last century when parties were less coherent, members of Cabinets less loyal to one another, and the King more ready to listen to advice given to him by others than his responsible Ministers. At the present day a peer would hesitate to offer counsel to the Crown on any matter which fell within the province of the Ministry of the day. Nevertheless, the Queen has a right to demand, and any peer, whether of the

¹ Vol. i. pp 52 54.

United Kingdom, of Scotland or of Ireland, has a right to offer counsel on matters which are of importance to the public welfare¹.

§ 2. *The Privy Council.*

The Privy Council, as such, has ceased to be a Council of the Crown. It meets for the purpose of making Orders, issuing Proclamations, or attending at formal acts of State, such as the admission of a Minister to his office or the rendering of homage by a Bishop for the temporalities of his see. The Cabinet has acquired the place which the Council once held as advisers of the Crown.

Some part of its earlier duties in this respect survive in the Committees of the Privy Council. The judicial Committee of the Privy Council when it gives judgement 'humbly advises Her Majesty' that an appeal should be allowed or dismissed, or a judgement varied: the Committee for Trade and Plantations used till quite recent times to advise other departments of Government on matters affecting commerce, Post, or colonial relations: and Committees of the Privy Council are appointed from time to time for purposes of inquiry. The Privy Council as advisers. P. 151.

The main business of the Privy Council must therefore be dealt with in the next chapter, for it is important to distinguish the duty of settling what shall be done and advising accordingly, from the duty of action in the various departments of State.

But since the advisers of the Crown are necessarily Privy Councillors, it would be well here to speak of the mode of appointment and dismissal of a Privy Councillor, and of any special matters appertaining to his *status*.

The Privy Councillor is nominated by the Queen; he takes the oath of office and the oath of allegiance and kisses the Queen's hand at a meeting of the Council. How appointed.

¹ The application for such an audience is made through an officer of the household, not through the Secretary of State. Diary of Lord Colchester, iii. 604.

The oath of office is as follows:—

The oath. You shall swear to be a true and faithful Servant unto the Queen's Majesty, as one of Her Majesty's Privy Council. You shall not know or understand of any manner of thing to be attempted, done, or spoken against Her Majesty's Person, Honour, Crown, or Dignity Royal; but you shall lett and withstand the same to the uttermost of your Power, and either cause it to be revealed to Her Majesty Herself, or to such of Her Privy Council as shall advertise Her Majesty of the same. You shall, in all things to be moved, treated and debated in Council, faithfully and truly declare your Mind and Opinion according to your Heart and Conscience; and shall keep secret all Matters committed and revealed unto you or that shall be treated of secretly in Council. And if any of the said Treaties or Councils shall touch any of the Counsellors, you shall not reveal it unto him, but shall keep the same until such time as, by the Consent of Her Majesty, or of the Council, Publication shall be made thereof. You shall to your uttermost bear faith and allegiance unto the Queen's Majesty: and shall assist and defend all jurisdictions, pre-eminences and authorities granted unto Her Majesty and annexed to the Crown by Acts of Parliament or otherwise, against all Foreign Princes, Persons, Prelates, States or Potentates. And generally in all things you shall do as a faithful and true Servant ought to do to Her Majesty. So help you God and the Holy Contents of this Book.

An affirmation may now be substituted for the oath¹.

How dismissed.

No formality beyond this is required for the appointment of a Privy Councillor, and none for his dismissal; it is enough for this purpose that the Queen should send for the Council book and strike his name off the list of the Privy Council. The demise of the Crown dissolves the whole Council in six months from the date of the demise, unless the new Sovereign should re-appoint the Council of his predecessors.

Composition of the Council.

The members composing the Privy Council may be said to fall into three groups. Members of the Cabinet must necessarily be made members of the Privy Council as the confidential advisers of the Crown. Beyond these there are

¹ 51 & 52 Vict. c. 46.

great offices which, though unconnected with politics, are usually associated with a place on the Council Board. Beyond these again is a group of persons eminent in political life or in the service of the Crown, upon whom the rank of Privy Councillor is conferred as a complimentary distinction ¹.

Until 1870 an alien born could not become a member of Parliament or of the Privy Council though naturalized. This disqualification was imposed by the Act of Settlement, and difficulties in removing it by Statute were added in 1714 ². Thus in order that naturalization might confer political rights in an individual case, it was necessary to repeal the Act of 1714 *ad hoc*, before a bill could be brought in to remove the statutory disability created by the Act of Settlement. The Naturalization Act of 1870 confers upon naturalized persons the full political rights of a British subject, and the distinction between citizens by birth and naturalization is abolished so far as political rights are concerned.

The members of the Privy Council, like the judges of the High Court of Justice, are in the Commission of the Peace for every county. The right of the Privy Council, or of a Committee of the Council, or of individual members, to commit persons to prison seems to have been practically settled by this arrangement and is limited by the security which the Habeas Corpus Acts supply, that a prisoner shall not be detained without the opportunity of speedy trial, bail or discharge. Thus the questions, which once were of interest ³, concerning the right of a Privy Councillor or of the collective Council to commit to prison are answered, and need no further discussion here.

¹ A king's son is a Privy Councillor by birth, during his father's lifetime, and does not need to be sworn. Greville Memoirs, iv. 274.

² 1 Geo. I, c. 4.

³ In the Seven Bishops' case much argument was expended on the legality of commitment by the lords of the Council, because it was not alleged in the warrant that the commitment was by the Privy Council, but only by certain lords. The right of the collective Council to commit for misdemeanour seems to have been admitted, and, equally, that an individual councillor could not so commit. 12 St. Trials, 183.

CHAPTER IV.

THE DEPARTMENTS OF GOVERNMENT AND THE MINISTERS OF THE CROWN.

I HAVE traced the history of the Councils of the Crown to their issue in the Cabinet of the present day, dependent for its existence upon the continued support of Parliament and the electorate.

The
Cabinet
not the
executive,

But the Cabinet is not the *executive* in the sense in which the Privy Council was the executive. We are apt to call the Cabinet the executive because it shapes policy and settles what shall be done in important matters, and also because it consists mainly of the heads of great departments of government.

but the
motive
power
in the
executive.

The Queen in Council gives orders that certain things shall be done; but the Cabinet gives no orders; it settles that orders shall be given, or—if the personal intervention of the Crown is necessary—that the Queen shall be advised to act in a certain manner. When we have learned all that can be learned about the Cabinet, we have only ascertained, as it seems to me, what is the nature of that body which, while Parliament and the country support it, decides with an irresistible force of decision what action shall be taken, what orders shall be given. The Cabinet advises the Queen that war be declared with a foreign power, the Foreign Secretary in the name of the Queen recalls our representative at the Court of that power, the Queen in Council proclaims the

declaration of war. The Cabinet decides that ships or troops shall be sent here or there; the First Lord of the Admiralty or the Secretary of State for War gives the necessary orders. The Cabinet decides that the Queen shall be advised to dissolve Parliament, the Queen in Council proclaims the dissolution of Parliament and the summons of a new one, the Chancellor issues the writs which bid the peers to attend and the constituencies to elect representatives.

The Cabinet is the motive power in our executive. The decisions of the Cabinet and the advice thereupon tendered to the Crown bring into action all the departments of government. Of these and of the Ministers who supervise them we must now treat.

SECTION I.

THE GROWTH OF DEPARTMENTS OF GOVERNMENT.

§ 1. *The Offices of the Household.*

The Ministers of the Crown represent a more universal requirement of royalty than do the Councils of the Crown. The principle that some form of representative consent is needed to alter the law of the land, and that the King should act with and through a group of advisers, is a feature peculiar to our own and other western constitutions: but every King must have Ministers to maintain the dignity of his household, to assist in the transaction of his business.

Official life may be said to begin with the King's household. The chamberlain, the steward, the horsthegn or marshal, and the cupbearer or butler, are the necessary ministers of the Teutonic court¹, in England and on the continent: and the Norman King had his Lord High Steward, his Lord Great Chamberlain, his Constable and his Marshal².

On these it is not necessary to dwell, nor to trace their history down to the present time. Shortly it may be said ^{The ancient household.}

¹ Stubbs, Const. Hist. i. 343.

² Ibid. 354.

that these great offices became hereditary and honorary¹, and then were duplicated in order that their work might be done. The Lord Great Chamberlain survives, as does the Earl Marshal, the head of the Herald's College. They discharge certain honorary duties at a coronation.

A Lord High Steward is appointed for the purpose of presiding at the trial of a peer for treason or felony, and also for the ceremonial of a coronation; the Lord High Constable is brought into existence for the coronation only.

The
modern
household.

But there is a Lord Steward, as also a Lord Chamberlain and a Master of the Horse; they have functions in the Queen's household at the present day, and the Lord Chamberlain is also a censor of plays, and of theatrical management. These were, as we have seen, Cabinet offices in the last century, before 1782, and they are still political offices in so far as they change hands, with other places in the household, on a change of government².

The
Chamber-
lain.

The Chamberlain, however, needs a fuller notice. This officer was originally responsible for the administration of the royal household. His office was therefore one of financial importance. Of this indications are afforded in the fact that in Saxon times the words *hordere* or *thesaurarius* were synonyms for the Chamberlain³; in the fact that some portions of the Norman King's revenues were not paid into the Exchequer but *in camera regis*⁴; in the frequent and elaborate ordinances for the regulation of the royal household; in the constant demand of the mediæval Parliaments that 'the King should live of his own,' that the Chamberlain

Import-
ance of the
office.

¹ Stubbs, Const. Hist. i. 345.

² These offices are :—

The Lord Steward of the House-
hold.

The Lord Chamberlain.

The Vice-Chamberlain.

The Master of the Horse.

The Treasurer of the Household.

The Controller of the Household.

The Captain of the Gentlemen at
Arms.

The Captain of the Yeomen of
the Guard.

The Master of the Buckhounds.

The Chief Equerry.

The Lords in Waiting.

³ Kemble, Saxons in England, ii. c. 3.

⁴ Report on Public Income and Expenditure, 1869, p. 341.

among other officers of State should be nominated in Parliament.

So when the office became hereditary and titular there was need of a real minister to do its work: this was the King's Chamberlain, represented at the Exchequer by two *camerarii*. The duties of these Chamberlains of the Exchequer became merely formal after the reign of Henry VII, but the King's Chamberlain retained his importance.

He was not concerned merely with the economy of the King's household; he was a medium of communication between King and Council, and occasionally endorsed petitions which the King had signed, or carried them with his instructions to the Secretary of State¹. In the Statute of Precedency he ranks above the King's secretaries².

As late as the reigns of William III and Anne the office was filled by statesmen of the first rank, by Shrewsbury and Sunderland in the reign of William, by Shrewsbury in the reign of Anne. But from this time forth, although the office was long regarded as one of Cabinet rank, it ceased to be held by persons of such political eminence.

§ 2. *The Political Offices, Executive and Regulative.*

In the management of the King's household we find the beginning of the departments of government. But as the business of a kingdom increases, the keeper of the treasure, which is expended on national purposes, becomes an official distinct from the Chamberlain and Steward, who receive and expend the funds by which the royal household is maintained. The secretarial business is transacted by the chief of the royal chaplains, who in the reign of Edward the Confessor becomes the Chancellor. The Saxon King seems to have needed a great officer to act as his deputy or representative, and the Norman King of necessity appointed some one to act on his behalf when he was absent in France. Hence arises the

¹ Nicolas, vol. vi. pp. ccxiv, ccxxiii. Ordinance of 1443.

² 31 Hen. VIII, c. 10, s. 4.

Justiciar, whose name indicates the constant unresting activity of the Norman Kings in enforcing the justice administered by their courts, and in asserting their peace as against the justice and the peace of localities and great lords of lands.

Growth of
political
offices.

Thus side by side with the officers of the King's household arise officers for the conduct of national business. These fall at first into three groups: the administration of the King's justice and maintenance of the King's peace; the account, receipt, and issue of the King's treasure; the communication of the King's will expressed individually or in Council.

Throughout the greater part of our history the only definitely organized department for the defence of the nation is the Admiralty; the War Office has slowly grown up as Parliament slowly recognized the need of a standing army, and the King as slowly surrendered his prerogatives in respect of military command. The union with Scotland, the union with Ireland, the growth of the colonies and the acquisition of India, have created new needs for organized administration, while the increased activity of the State has established central control over trade, local government, education, and finally over agriculture.

I propose in this chapter to deal with the history and constitution of these various departments, leaving to a separate chapter the administration of justice and the constitution of the courts. With some departments I must hereafter deal more fully, and shall therefore speak of them briefly in this chapter.

Arrange-
ment.

One searches for some logical arrangement of the functions of government which should give life and reality to an account of the offices of State, and it is possible to find such an arrangement by a division of them into *executive* and *regulative*. Apart from the offices of the household, the departments of government fall into these two groups. There are some things which are necessary to be done, and some rules necessary to be enforced if a State is to be solvent and orderly at home and to maintain independence and dignity

abroad. There are other things which are not necessary but expedient to be done, and other rules in like manner to be observed, for the well-being of the community. The first of these represent the duty of the executive *par excellence*, the essential business of government. The second represent the desire of the State to regulate human conduct so as to promote the well-being of the community, not merely to secure its existence.

The executive offices then are these:—

Executive,

The Privy Council—for many purposes the formal executive of the country.

The Lord President of the Council.

The Lord Chancellor.

The Lord Privy Seal.

The Secretaries of State.

The Admiralty Board.

The Treasury Board and the Exchequer.

The Post Office.

The regulative offices are:—

regula-
tive,

The Board of Trade.

The Local Government Board.

The Board of Agriculture.

The Board of Works.

The Committee of Council on Education.

Other offices are not so easy to classify. The Scotch Office, with its Secretary, has merely taken over the regulative business of some of the above-named departments in so far as it relates to Scotland. The Irish Office, in theory more immediately subordinate to the Home Office, has in fact wider powers than the Scotch Office. The Chancellor of the Duchy of Lancaster has nominal duties, judicial and administrative. The Law Officers of the Crown might be included in the Royal Councils, but for convenience I shall treat of them here.

The non-political executive departments and the permanent staff of the political departments will fall into the concluding section of this chapter.

SECTION II.

THE EXECUTIVE OFFICES.

§ 1. *The Privy Council.*

The Council a means of expressing the royal pleasure.

I have spoken of the Privy Council as it once was, a Council of the Crown as well as a branch of the executive, a body which assisted the Crown to decide upon policy and, with the Crown, gave the orders for carrying that policy into effect.

But we must now regard it as divested of its consultative duties, as a formal medium for expressing the royal pleasure in certain matters of executive government.

By Order.

These are dealt with either by Order in Council or by Proclamation; they are so dealt with either in virtue of the discretionary prerogative of the Crown, or under powers conferred by Statute; and where a Statute confers powers it may enable them to be exercised by Lords of the Council, or any two of them, without the presence of the Queen.

Some matters are of a formal character. The entire Council was summoned to receive the Queen's announcement of her intended marriage; in the Council persons are admitted to its membership or to the offices of State. It is in the Council that a Minister takes the official oath, kisses the Queen's hands, and receives the insignia of his office; that a Bishop does homage for the temporalities of his see; that the Sheriffs of counties for the current year are chosen.

By Proclamation.

When matters are merely approved or passed by the Queen in Council, an *Order* is made to that effect. When it is desired to render the action of the Council widely public, this is done by royal *Proclamation*.

Proclamations are of unfrequent use, except for the purpose of summoning, proroguing, or dissolving Parliament, for declaring war or peace, in fact for announcing some matter which may be supposed to concern the nation in its entirety.

The multifarious character of the Orders in Council made under statutory powers may be seen by a reference to the

index to any volume of the London Gazette. Some effect departmental legislation of a very important character. They are the instruments of government for Crown colonies, newly settled countries and protectorates; they confirm or disallow the acts of colonial legislatures; they give effect to treaties, grant charters to companies or municipal bodies, or regulate the business of departments.

Nature of Orders.

Usually the Council acts, not on its own responsibility but on the responsibility of a department¹, the Colonial Office, the Foreign Office, or some office in which it is desired to regulate or redistribute the duties and salaries. When a petition is addressed to the Crown for the grant of a charter, the matter is referred to a Committee of the Privy Council for advice. It is only thus, through the agency of Committees, that the consultative functions of the Council survive. In other cases in which the Council may be left to act on its own responsibility it can consult the law officers of the Crown. The modes of summons to meetings of the Council and of Committees have been set forth earlier: the persons summoned need not consist entirely of Cabinet Ministers, nor is it necessary that more than three should be present. The Orders of the Council are authenticated by the signature of the clerk.

Whence they originate.

How authenticated.

The President of the Council is appointed by a declaration made in Council by the Queen. He is an officer of the highest dignity. In the House of Lords he ranks next after the Chancellor and Treasurer, and this was his position in the Council until the present century. He now, by a custom the commencement of which is not certain, takes the first place at the council table on the Queen's right hand.

The President.

We may note the constant tendency of the business of the Privy Council to pass into the hands of specially constituted departments of government. Much of the work which is now done entirely by the Secretary of State for Foreign Affairs was formerly dealt with by a Committee of the Lords of the Council. The statutory duties of the Board of Trade

Transfer of duties to departments.

¹ See Commons Papers for 1854, vol. 27, p. 221.

are discharged, not by the still existing Committee of Council for Trade and Plantations, but by the President and Secretary of the Board. The duties of the Council in regard to public health have gone to the Local Government Board; its duties in regard to agriculture to the more recently constituted Board of Agriculture¹. This transposition of business has gone on ever since the Council, in its entirety, ceased to be a consultative, and became a purely executive body. It first appeared in the development of the various secretaryships of State, and we see it in process in the constitution of the modern Boards.

Import-
ance of
business
done in
Council.

Another point to note is the immense importance of the business which may be transacted in the Council without discussion, and with no opportunity of question in Parliament, at the instance of the Cabinet or of a department. Some of these matters might attract the attention of Parliament, though not till their effects could no longer be cancelled or undone. Of others Parliament would hardly take heed. The redistribution of duties in the War Office determines the channels through which skilled advice may reach the Secretary of State in the business of his department; the extension of the powers of the High Commissioner in South Africa amounts to an assumption of sovereign rights over a vast territory², but the discussion on such action of the executive may be nearly nominal³. No doubt this is desirable in the interests of good government. The executive could not transact its business if it were subject to constant interference from irresponsible politicians, and the collective House of Commons does well to avoid sharing with the executive the responsibility for its action.

The Privy Council is one of the channels through which the pleasure of the Crown is expressed, but there are individual departments of government which exist or have existed

¹ From 1883 to 1889 there was a Committee of the Council for Agriculture. Hansard, cccxxvi. 1768.

² Order in Council, 9th May, 1891.

³ Order in Council, 21st Feb. 1888. Hansard, cccxii. 253.

for the same purpose. These are the Chancery, the office of the Privy Seal, and the Secretariat.

§ 2. *The Chancellor.*

The great office of Chancellor dates back in our history to the reign of Edward the Confessor. He was the chief of the King's secretaries, the chief of the King's chaplains, and custodian of the royal seal. Edward the Confessor was the first King who used the Norman practice of sealing, instead of signing documents to which he was a party, and the Chancellor is thus specially associated with the seal, though it is probable that earlier kings than Edward had employed one officer as chief of their secretarial and chapel staff¹.

All three functions combined to increase the Chancellor's importance. As Secretary he enjoyed the King's confidence in secular matters; as Chaplain he advised the King in matters of conscience; as Keeper of the Seal² he was necessary to all outward and formal expressions of the royal will. In the reign of Henry II he ranked next in dignity after the Justiciar, and was present at all Councils of the King.

In the reign of Edward I the Chancellor begins to appear in the three characters in which we now know him; as a great political officer, as the head of a department for the issue of writs and the custody of documents in which the King's interest is concerned, as the administrator of the King's grace.

He was a prominent member of the King's Council, where as a learned lawyer his opinion would carry weight. His original staff in the Chancery consisted of certain clerks whose duty it was to hear complaints and afford remedy by

¹ Stubbs, *Const. Hist.* i. 352. The derivation of the name is there traced to the *cancelli* or screen, behind which the secretary's business was conducted, not to the jesting explanation of John of Salisbury, 'Hic est qui regni leges cancellat iniquas.'

² For the history of the Great Seal, see Nicolas, *Proceedings of the Privy Council*, vol. vi. p. cli, et seq.

writ, and six others who were busied in engrossing writs. The formation of the three Common Law Courts had doubtless removed from the Curia or the Council much judicial business in which the Chancellor had taken part, but he was brought into contact with the administration of justice, as head of the department whence writs were issued, the *officina brevium*.

His
judicial
duties,

To the Chancellor were also specially referred petitions the response to which involved the use of the seal; in common with the justices he was required to overlook all petitions, and determine what could and what could not be answered without reference to the King's grace. These latter the Chancellor and other chief Ministers were directed to take to the King¹.

Equitable, But in the twenty-second year of Edward III, matters which were of grace were definitely committed to the Chancellor for decision², and from this point there begins to develop that body of rules—supplementing the deficiencies or correcting the harshness of the Common Law—which we call Equity.

It is with the formation and development of the rules of Equity that we commonly associate the history of the Chancellor's office. But the Chancellor as judge must be dealt with in a chapter on the Courts. Here it is important to bear in mind that besides the equitable jurisdiction thus created, the Chancellor exercised other jurisdictions. For some time, as appears from the Calendar of Proceedings in Chancery, he was called on to deal with cases of violence and oppression, such as more often came before the collective Privy Council³; and though he gradually dropped such cases,

Coercive,

¹ Ordinance of 1280. Stubbs, Const. Hist. ii. 263.

² Ibid. 269.

³ The following illustrate the text:—

William Midynton v. John of Cottingham. Defendant assaulted and attempted to murder the plaintiff in Waughen Church in Holderness, and still lies in wait for him, so that he durst not abide in the country. Calendar of Proceedings in Chancery, vol. i. p. xx.

Robert Burton, Clerk v. Waller Yerburch and William Hert. Bill filed against defendants (followers of Wyclyff) on account of various outrages against the plaintiff, in consequence of his opposition to the doctrines of Wyclyff. Calendar, vol. i. p. xxv. temp. Henry VI, and see p. cxxviii. temp. Henry VIII.

leaving them to the Council or to the Star Chamber, the tradition lingered late¹.

It was doubtless because the Chancellor was the member of the Council to whom matters of grace were habitually referred, that the *petition of right*, the remedy possessed by the subject against the sovereign, went through its earliest stages in the Chancery. The procedure in respect of this remedy was changed in 1860². Miscellaneous.

Again, as having once been a member of the Curia and a baron of the Exchequer, he had some powers in common with the judges of the Common Law Courts. He issued writs of Habeas Corpus, doing this in vacation as well as term, and writs of Prohibition to keep inferior Courts within their jurisdiction.

Again the Chancellor acted judicially in the exercise of certain prerogatives of the Crown, its prerogative as to trade in matters of bankruptcy, its prerogative in respect of the persons and estates of idiots and lunatics, and the custody of infants. The jurisdictions in these matters are now governed almost entirely by Statute³. It remains to consider the other official duties of the Chancellor.

His place in Parliament, as Speaker of the House of Lords, is as much a matter for a treatise on Parliament, as his place in the Supreme Court of Judicature is a matter for a chapter on the Courts. We must pass to those special matters in which he advises, or acts on behalf of, the Crown. His parliamentary duties.

He is responsible for the appointment of the judges of the

¹ Lord Campbell, writing in 1843, says, 'Anciently the Chancellor took cognizance of riots and conspiracies, upon applications for surety of the peace : but this criminal jurisdiction has been long obsolete, although articles of the peace still may be, and sometimes are, exhibited before him.' Campbell, *Lives of Chancellors*, vol. i. p. 14.

² 23 & 24 Vict. c. 34.

³ The Chancellor is entrusted by sign manual warrant with the care and custody of lunatics, 53 Vict. c. 108 (Lunacy Act, 1890) ; for the form of warrant, see Campbell, *Lives of Chancellors*, i. 15. The wardship of infants and care of their estates is reserved to the Chancery Division of the High Court by the Judicature Act, 1873, s. 34. Bankruptcy is dealt with under the Bankruptcy Act of 1883, by the High Court and County Courts.

Adminis-
trative
duties:

High Court, for the placing of names on the Commission of the Peace, and for their removal in case of need, acting usually, though not necessarily, on the advice of the Lord Lieutenant in the case of the county magistrates. Here, although he does not expressly take the pleasure of the Crown, he acts as the exponent of the royal will; it would be possible though it would be unusual for directions to come to the Chancellor through a Secretary of State for the insertion or removal of a name on the Commission¹.

appoint-
ments.

In this respect his rights differ from those which he exercises in the appointment and removal of County Court Judges, or the presentation to Crown livings of value of £20 and less. In the first case by Statute, in the second by custom, he acts independently of the Crown².

The
Crown
Office in
Chancery.

Besides his duties as a judge, and his responsibility for many judicial and some ecclesiastical appointments, the Chancellor is the head of the office in which his first duties began. The Crown Office in Chancery is no longer the *officina brevium*, the place where new rights of action were created as new writs were devised. The inventive powers of the clerks in Chancery failed to keep pace with the requirements of suitors; Equity and fictions had superseded the original writs long before the modern simplifications of procedure. But it is in the Crown Office in Chancery that the Great Seal is,

The Clerk
of the
Crown.

for most purposes, affixed³. At the head of the permanent staff in this department is the Clerk of the Crown in Chancery who holds an office of great dignity and antiquity. The duties and emoluments of this office were stated and defined as long ago as the twenty-second year of Edward III. The Clerk of the Crown may claim to be 'the first esquire and first clerk of England⁴.' He is appointed by sign manual

¹ *Harrison v. Bush*, 5 E. & B. 351.

² The second case is more especially noticeable because when the Prime Minister presents to Crown livings of greater value, he takes the Queen's pleasure before the appointment is made. *Hansard*, clxix. 1919.

³ The duties of the Petty Bag Office are now transferred to the Crown Office. 37 & 38 Vict. c. 81.

⁴ Crown Office MS.

warrant, and he takes a part in many important acts of the State. From his office issue writs for election of members to serve in the House of Commons; he receives and makes a list of the returns; when the royal assent is to be given to Bills in Parliament he attends in the House of Lords to read the Bills and the Clerk of the Parliament gives the royal answer: when Sheriffs are to be chosen, as described later, he attends in the Court with the list of justices of the peace and notes who are named. His name written or printed at the end of documents to which the Great Seal is affixed authenticates the fact that the sealing has taken place on due warrant¹.

Some few important matters, such as powers to treat, and ratifications², do not pass through this office, but the Chancellor is directly responsible in all cases for the use of the Great Seal, the ultimate expression of the will of the Sovereign.

The Chancellor is and always has been a member of the Privy Council, and of the Cabinet, not as of right but because his duties as holder of the Great Seal make him a necessary party to the innermost Councils of the Crown. His political and judicial duties do not come into conflict, because he is not concerned with the administration of the criminal law, and so is not liable to preside in Court over prosecutions which he has advised in the Cabinet.

There remain but a few points connected with the office:—

(1) The Chancellor is Chancellor of that part of the United Kingdom called Great Britain, and the Act of Union with Scotland provides that there should be but one Great Seal for the two kingdoms. There is a Lord Chancellor for Ireland, but the Great Seal, though it exists in duplicate for Irish use, is the Great Seal of the United Kingdom³.

¹ 47 & 48 Vict. c. 29.

² Treaties and ratifications were at one time prepared and enrolled in the Chancery. This practice was uniform till 1624. Thomas, *Hist. of Public Departments*, 33.

³ See, as to the title of the Lord Chancellor, *McQueen, House of Lords and Privy Council*, p. 20.

25 Car. II, c. 2. The religious disability. (2) The office is one subject to a religious disability. The Test Act required that every one who held an office, civil or military, under the Crown, should not merely receive the sacrament after the ritual of the Church of England, but should take an oath abjuring the doctrine of transubstantiation.

9 Geo. IV, c. 17. 10 Geo. IV, c. 7. The requirement as to taking the sacrament was removed in 1828, and the Roman Catholic Relief Act, 1829, altered the form of oath required, whether for a seat in Parliament or for entry upon a civil or military office, making it acceptable to a Roman Catholic. But it was provided that neither the Chancellor of Great Britain nor the Lord Keeper, nor Lords Commissioners of the Great Seal, nor the Lord Lieutenant of Ireland should be relieved from any requirements to which they were at the time subject. The Statute Law Revision Act, 1863, has wholly repealed the Test Act of Charles II, but it is still held that the exception introduced into the Catholic Relief Act, disables a Roman Catholic for the offices therein mentioned¹.

The Lord Keeper. (3) The office of Lord Keeper of the Great Seal originated as it would seem in the practice of entrusting the Seal temporarily to an officer of State during a vacancy in the Chancellorship, sometimes with limited powers, or a lower rank. This developed into more permanent appointments, in which the Lord Keeper held office during the King's pleasure. He often was not a peer, but he is by Statute entitled to the 'like place, pre-eminence, jurisdiction, execution of laws, and all other customs, commodities, and advantages' as the Lord Chancellor. The last Lord Keeper was Sir Robert Henley afterwards Lord Northington², who was made Chancellor on the accession of George III.

5 Eliz. c. 18. Commissioner of the Great Seal. (4) It is sometimes desirable to appoint by commission under the Great Seal certain persons to execute the office of Lord Chancellor. Their powers are declared by Statute to be

¹ See debate in House of Commons, Feb. 4, 1891. Hansard, cccxlix. 1734.

² Campbell's Lives of the Chancellors, i, 21, v. 186, 199.

in all respects such as the Lord Chancellor or Lord Keeper enjoys, but their rank is not the same. If peers, they take their place according to their peerage. If commoners, they take place after the peers and the Speaker of the House of Commons.

§ 3. *The Lord Privy Seal.*

The office of Lord Privy Seal exists and is held, without emolument, by a member of the Cabinet; but its duties are historical; having long ceased to be more than formal, they were abolished in the year 1884. The Privy Seal:

The authority of the Privy Seal was formerly needed its objects. mainly for two purposes, the issue of money from the Exchequer, and the affixing of the Great Seal to Letters Patent, for it had been the desire of mediæval Councils and Parliaments to secure adequate responsibility for the issue of public money, or for the action of the King in matters of State.

The need of the Privy Seal as the warrant for passing Letters Patent under the Great Seal was made a rule of the Privy Council of Henry VI, and was enforced by Statute in 1535¹.

The need of this Seal for the issue of public money is stated by Coke.

‘Every warrant of the Queen herself to issue her Treasure is not sufficient; for the Queen’s warrant by word of mouth or, which is more, her warrant in writing under her privy signet is not sufficient. But the warrant which is sufficient to issue the King’s Treasure ought to be under the Great or Privy Seal.’

It is unnecessary to say more on this subject since it was Its disuse. enacted in 1884³ that—

it shall not be necessary that any instrument shall after the passing of this Act be passed under the Privy Seal.

Yet the office exists, and its history is a long one. ‘A fit History of clerk to keep the Privy Seal’ was one of the officers who Privy Seal. by the ordinances of 1311 was to be chosen by the King with

¹ 27 Hen. VIII, c. 11, and see p. 50 *supra*.

² xi. Co. Rep. 92.

³ 47 & 48 Vict. c. 30, s. 3.

the counsel and consent of the baronage. In the reign of Edward III the Keeper of the Privy Seal is a member of the King's Council: in the first Parliament of Richard II the Commons desire to control his appointment. The office was regarded with jealousy because of the frequent use of letters under Privy Seal to interfere with the ordinary course of law.

From the middle of the sixteenth century the office has been held by statesmen of the first rank. Perhaps the three most interesting figures in the list of Lords Privy Seal are Thomas Cromwell (1536); Dr. Robinson (1711), who was at the same time Bishop of Bristol and Plenipotentiary for concluding the Treaty of Utrecht; and Lord Chatham, who held the office as Prime Minister in 1766.

§ 4. *The Secretariat.*

The five
Secre-
taries of
State:

as a me-
dium of
communi-
cation
with the
Crown,

Her Majesty's Principal Secretaries of State, now five in number, are the chief means of communication between the subject and the Queen. Peers of Parliament are Councillors of the Crown and have a right of access to the person of the Sovereign. Privy Councillors are the sworn advisers of the Queen, and as such may individually or collectively offer counsel for which they must hold themselves responsible to Parliament. But outside of these is the mass of the Queen's subjects who can only address the Crown in Council or the Crown in person, and in the latter case the only approach to the Crown is through a Secretary of State. A department of government may be reached by direct communication: an aggrieved soldier or sailor may complain to the War Office or to the Admiralty, a Civil servant whose emoluments do not correspond with his estimate of his deserts may address the Lords of the Treasury, but no communication can be made to the Sovereign save through the intervention of a Secretary of State: nor with a few exceptions can any authentic communication be made by the Sovereign that is not counter-signed by a Secretary of State.

The Secretaries of State are not merely the channels of communication between subject and Sovereign. Each is the head of an important department of government, and in that department is invested with statutory powers, or administers certain prerogatives of the Crown for the exercise of which he is responsible to Parliament. Of these powers it will be proper to speak hereafter in dealing with the special departments of these officers. It is enough here to trace the origin of the office of Secretary of State and the assignment to it of duties which necessitate the existence of five principal Secretaries of State.

We first hear of the King's Secretary in the reign of Henry III. The duties of a Secretary had doubtless in earlier times been discharged by the Chancellor and his staff: but administrative business increased,—the severance of the Chancery from the Exchequer at the end of the twelfth century indicates the increasing importance of both departments,—and the King's Clerk or Secretary became an officer distinct from the clerks or chaplains who had acted under the Chancellor.

The office was at first a part of the royal household. Its holder might be a man of character and capacity, fit to be a member of the King's Council, or to be sent as an envoy to foreign powers. Such were the Secretaries of Henry III and Edward I. Or he might be an inferior officer of the household, and such seems to have been the position of the Secretary of Edward III, who ranked in place and emolument with the surgeon and the clerks of the kitchen¹.

In 1433 two Secretaries were appointed, one by the delivery of the King's Signet, the other by patent². A second Secretary had become necessary for the transaction of the King's business in France.

In 1443 an Ordinance or Order in Council, made various rules to ensure the responsibility of the Council and officers of

¹ Ordinances for the Royal Household, 10. 32. 162.

² Nicolas, Proceedings of Privy Council, vi. p. cviii.

the King for answers given or grants made in response to Petitions. Lords of the Council who promoted a petition were required to sign it: if it dealt with matters of grace, it was to be laid before the King thus endorsed: if he assented to it he was to sign it, or order the Chamberlain to do so, or to take it with his commands to the Secretary: if the answer involved a grant, the bill which contained the petition was to be delivered to the Secretary to prepare letters which, sealed with the Signet, should be authority for affixing the Privy Seal: and this in its turn authorized the confirmation of the grant by letters under the Great Seal¹. Here we find the Secretary in a position of recognized responsibility for the expression of the King's will. And soon after, in 1476, a newly appointed Secretary is described as 'Principal Secretary,' not, as it would seem, to denote a difference in the rank of the two Secretaries, but to mark the responsible character of the office, as distinct from that of a mere clerk or amanuensis².

a Principal Secretary.

The reign of Henry VIII marks an important advance in the position of the Principal Secretary. The responsibility for the use of the Signet, indicated by the Ordinance of 1443, is confirmed by Statute³. The Secretaries are still members of the King's household, but they rank next to the greater household officers⁴, and in Parliament⁵ and Council, they have their place assigned by Statute. The Secretary, if he is a baron, is to sit above all other barons; if a bishop, above all

¹ Nicolaa, vi. p. clxxxviii; and vide supra, p. 50.

² Ibid. vi. p. cviii.

³ 27 Hen. VIII, c. 11.

⁴ Ordinances for the Royal Household, 162. Yet the Secretaries lived in extreme discomfort. In 1545 Sir W. Paget, one of the Secretaries and then ambassador in France, wrote to the other Secretary to beg that his lodging might be changed for the better: 'You know that the chambre over the gate will scant reseyve my bedde and a table to write at for myself. The study you know is not mete to be trampled in for diseasing his Majesty. I must nedes have a place to kepe my table in.' Thomas, Hist. of Public Departments, p. 26.

⁵ 31 Hen. VIII, c. 10. Stubbs, Const. Hist. iii. 471, 472. The presence of the Secretary, though a commoner, and of the judges, shows how the House of Lords, in the sixteenth century, did double duty as the *Magnam Concilium* and as a House of Parliament.

other bishops ; if not a peer he is to sit on the uppermost form or woolsack in the House.

The Secretaries of State,

Not long after this a warrant, issued to Thomas Wriothesley and Ralph Sadler, gave them the 'name and office of the King's Majesty's Principal Secretaries during His Highness' pleasure,' required them to keep two Signets and a book of all warrants which passed under their hands, and placed them in Council next after the Vice-Chamberlain. They were both members of the Commons, but one was always to sit in the Upper House, and one in the Lower House, interchanging weeks, unless the King was present in the House of Lords when both were to be there¹.

The growing importance of the office is indicated not merely by the precedence given to the holders, but by the quality of the men who held it. Cromwell was for a short time Secretary to Henry VIII, and Sir William Cecil was Secretary to Elizabeth from her accession until he was made Lord Treasurer in 1571. After the reign of Henry VIII it would seem that the Secretary ceased to be an officer of the household. He does not appear as an *item* in the household expenditure of Elizabeth, and in the reign of James I he was one of the few who might bring a servant with him to the King's Court².

During the greater part of Elizabeth's reign there was but one Secretary, but at the close of it Sir Robert Cecil shared the duties with another, he being called 'Our Principal Secretary of Estate,' and the other, 'one of our Secretaries of Estate.' From this time, until the year 1794, it was the rule that there should be two Secretaries of State; the exceptions occurred in 1616, when there were three,—from 1707 until 1746, when there was usually a third Secretary for Scotch business,—and from 1768 until 1782, when there was a third Secretary for Colonial business.

At this point one may stop to consider the duties and

¹ Nicolas, vi. p. cxxiii.

² Ordinances for the Royal Household, p. 304.

Duties of a
Secretary
of State,

powers of the Secretaries of State. From the reign of Henry VIII, certainly, they were the channel through which alone the Crown could be approached in home and foreign affairs, and the medium through which the pleasure of the Crown was expressed.

Thus the Secretary of Henry VIII complains that the Lord Mayor of London has communicated with Wolsey on a matter of State without first addressing him in order that the King's pleasure might be taken¹.

The rules made by Edward VI for the conduct of business in the Council, make the Secretary the medium of communication between the King and his Council or its Committees, a practice observed in the transmission of Cabinet minutes until comparatively recent times².

Cecil in his treatise on *The Dignity of a Secretary of Estate with the care and peril thereof*, speaks of the Secretary's liberty of negotiation at discretion, at home and abroad, without 'authority or warrant (like other servants of princes) in disbursement, conference or commission, but the virtue and word of his Sovereign.'

in the
Privy
Council,

The Secretaries were members of the Privy Council, and after the Restoration they were members of that inner Council which prepared and settled the business to be brought before the larger body, the Privy Council, with whose consent and advice the King acted. But it was not until the Privy Council ceased to combine deliberative and executive functions, that the office of Secretary of State assumed its present importance.

Before this change took effect, a Secretary of State assisted at the private discussion of business to be brought before the Privy Council, he was a necessary instrument for carrying out the pleasure of the King, and might even be a personage whose opinion carried great weight, and yet he exercised little independent discretion in executive government. He was

¹ Nicolas, vi. p. cxviii.

² Grenville Corresp. iii. 16 note.

responsible directly to the King and the Council, remotely, to Parliament. The Tudors from their own force of character had given importance to the office. It was something to be the exponent of the will of one who always had a will of his own. But throughout the seventeenth century we find no Secretary of the calibre of Cromwell or Cecil, and in the reign of William III Sir William Trumbull resigned the office because, when the King was in Holland, the Lord Justices in Council treated him 'more like a footman than a Secretary¹.'

But the Secretary was not the servant of the Cabinet, as he ^{in the} had been the servant of the Council. He had been the ^{Cabinet.} medium of communication between the King and his Council, and between the Crown in Council, the recognized executive, and the outside world. But when the Privy Council became an administrative department, and the Cabinet took its place as the motive power, a body unrecognized by law, the Secretary of State as member of this inner circle, became more independent, more responsible and more important.

Domestic, foreign, and colonial business which had been ^{Increased} transacted by Committees of the Privy Council passed into ^{importance of} the hands of the Secretaries, and they became the authorized ^{office.} exponents of the King's pleasure in the various departments of government. In the management of his department each Secretary is checked by the collective responsibility of the Cabinet, but he does not receive the orders of the Council, nor, since the King ceased to preside at Cabinet meetings, does he work under the constant control of the Crown.

Increased responsibility to Parliament adds to the power of every Minister, for responsibility to Parliament means that the Minister is accepted by Parliament and has the support of Parliament at his back. Thus the Secretary of State has grown from being merely a confidential servant to be a great executive officer.

¹ Shrewsbury Correspondence (Coxe), 504.

The
Northern
and
Southern
Depart-
ments.

So much for the general history and powers of a Secretary of State. I will now speak of his departmental duties. From the Revolution until 1782, except during the temporary existence of the Scotch and the Colonial Secretary, the duties of the two Secretaries were divided by a geographical division of the globe into Northern and Southern Departments. The duties of the Northern Department consisted in communications with the northern powers of Europe, those of the Southern included our dealings with France, Spain, Portugal, Switzerland, Italy, Turkey, as well as Irish and Colonial business and the work of the Home Office. The burden thus laid upon the shoulders of the Southern Secretary seems enormous, but it is in truth more apparent than real. Irish business consisted mainly in communications as to general policy passing through the Secretary of State from the Ministry to the Lord Lieutenant. The colonies were few, communication with them was difficult, and some part of the business relating to them was, prior to 1768 and after 1782, discharged by a Committee of the Privy Council. The bulk of the present work of the Home Office is the creation of modern Statutes. The Secretaries of the last century represented the Foreign Office cut in two, with some miscellaneous business assigned to that portion which dealt with the southern powers of Europe.

The Home
Office and
Foreign
Office.

But in 1782 the duties of the two Secretaries were rearranged. The Southern Department became the Home Office, retaining the Irish and Colonial business; the Northern Department became the Foreign Office. Meantime the constitutional position of the army was singularly confused. The Secretary at War, who was not a Secretary of State, was responsible to Parliament for the payment and civil control of the army, he directed the movements of troops, but these had to be sanctioned by a Secretary of State. Until 1794 this responsibility rested with the Home Office, but in 1794 a third Secretary of State was appointed, who was to manage the affairs of war exclusively, and in 1801

The War
and
Colonial
Office.

the business of the Colonies was assigned to the same Secretary¹.

The long peace which followed the Napoleonic wars, and the rapid growth of our colonies, caused the war duties of the Colonial Secretary to fall into the background, and during the Crimean War, in 1854, it became necessary to appoint a Secretary of State for War, who should be solely responsible for the movements, payment and civil control of the land forces of the nation. The last addition to the Secretariat is the Secretary of State for India, appointed first in 1858, when the East India Company's powers were taken away and the government of India passed into the hands of the Ministers of the Crown.

A separate
War Office.

The India
Office.

Except in so far as Statute gives powers to one or other of the five Secretaries of State, each is capable of performing any one of the functions of the various departments which I have briefly described². The Secretaries are in this respect like the Judges of the High Court of Justice, each individually possesses and may exercise the powers of any one of the others, but as its special business is assigned to each of the divisions of the High Court, so is a special department of government assigned to each of the members of the Secretariat. Each and all are primarily the means by which the royal pleasure is communicated³, the work of each department is the work of the Crown, acting on the advice of responsible Ministers,

¹ See, as to the duties of the Secretaries, Hansard, Parl. Deb. First Series 33, p. 893.

² Mr. Pitt in 1797, defending the creation of the third Secretaryship, denies that 'each office of Secretary of State has (not by custom or convenience for practical purposes, but by law) a particular designation, department and division. I say the office of Secretary of State has no such department, designation and division, but is in the legal sense independent of any such distinction.' 33 Parl. Hist. 976.

³ Much discussion took place in 1812, when the Prince Regent employed a *Private Secretary*, as to the constitutional position of such an officer. The House of Commons was assured that he was quite 'incapable of receiving the royal commands in the constitutional sense of the words or of carrying them into effect.' In fact he is not a means of expressing the *official will* of the Crown. Cobbett, Parl. Debates, 22, p. 339.

and for such action and advice each of these Ministers must answer to Parliament.

The Secretaries of State are all appointed in the same manner by the delivery to them of three seals, the Signet, a lesser seal, and a small seal called the *cachet*: all these are engraved with the royal arms, but the Signet alone bears the royal arms with supporters.

'The office of Secretary of State in the legal sense depends on the grant and delivery of the seals. The title of the office is "one of his Majesty's principal Secretaries of State." By the grant and the delivery of the seals¹, every one of these persons becomes a legal organ to countersign any act of State, and he is placed afterwards in that department of business which his Majesty thinks fit to allot for him.' (33 Parl. Hist. 976.)

The Seals. The Signet is of these seals the one which has the longest history, for the custody of it was the primary duty of the King's Secretary long before the Secretary became head of a department. The statutory requirement as to its use has been set forth earlier.

For this purpose the Secretary of State had an office and four clerks, and as the Secretaries increased in number, the Signet Office was considered to pertain to all alike, but the business was transacted through the Home Office.

This use of the Signet was abolished in 1851. The duties

¹ It is stated by Todd (Parl. Gov. in England, ii. 495), and others, that a Secretary of State receives letters patent appointing him during pleasure. This is not so. Patents were issued from the time that a second Secretary was first appointed in the fifteenth century, and the practice appears to have been followed until 1852. In that year Lord John Russell became Foreign Secretary and Leader of the House of Commons in Lord Aberdeen's ministry and, as he did not expect to be able to combine these two duties for long, he did not take out a patent, and in fact resigned the Foreign Office within two months. From that time the practice was intermittent (see Hansard, cxlii. 620, cxliii. 1426, cliii. 1300, 1828) until 1868. Since the retirement of Mr. Disraeli's Ministry in that year patents have not been issued: nor in any case would they affect the powers of the Secretary, for these follow the seals.

From 1855 until 1861, a supplementary patent was issued to the Secretary of State for War limiting his powers in respect of military appointments and discipline.

heretofore performed by the Clerks of the Signet, and not superseded by this Act, were to be performed in the Home Office. But such use of the Signet as continues to be made does not call for the intervention of the Home Office. In the Foreign Office the instruments which authorize the affixing of the Great Seal to powers to treat, and ratifications of treaties pass under the Signet as well as the sign manual, and are countersigned by the Secretary of State. In the Colonial Office, the Signet is affixed to Commissions, and also to Instructions; these last pass the sign manual but are not countersigned by the Secretary of State¹.

The second seal is used for royal warrants and commissions, countersigned by the Secretaries of State.

The cachet is used to seal the envelopes of letters containing communications made personally by the King or Queen to a foreign sovereign.

Thus in the Foreign Office all three seals are used. In the Colonial Office the first two; the second only in the Home Office and War Office; none are used in the India Office.

§ 5. *The Treasury and Exchequer.*

The Normans introduced into our institutions a methodical system of finance. The Exchequer was the Curia sitting for financial purposes. But there were certain officers of the Curia whose duties lay specially in the Exchequer, and a clerical staff appropriate to the business of the department.

The Exchequer consisted of two offices, the Upper and the Lower: the first was a court of *Account*, the second of *Receipt*. What was due to the King was ascertained in the Exchequer of Account and paid in to the Exchequer of Receipt, and for payments made in the latter acquittance was obtained in the former. The procedure of the Exchequer will be dealt with in a later chapter; I will deal here with the staff.

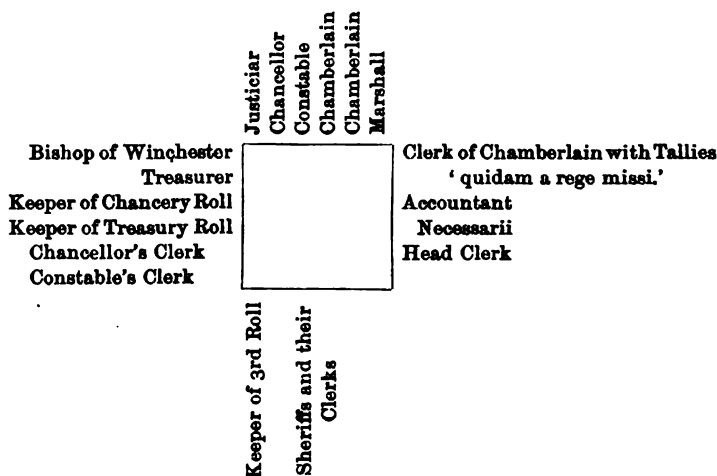
¹ This is an exception to the general rule of counter-signature. The Queen signs the Instructions at the head, and initials them at the foot. They are then sealed with the Signet.

The Lord-Treasurer.

The
Treasurer.

The Treasurer and barons sat in the Upper Exchequer¹ to take account of what was due to the King, and to exercise a general financial control². The Treasurer was also responsible for the receipts and issue of the revenue in the Lower Exchequer. He was the connecting link between the two departments, but by no means the most important person at the Exchequer board. Rather he was a busy official, necessary to the business of the office but overshadowed in dignity by the Justiciar and Chancellor. In the reign of Richard I the Chancery was separated from the Exchequer, and the Treasurer was thus relieved from subordination to one of the greater officers of State³. The Great Seal was now no longer used for Exchequer purposes, and in the reign of Henry III the Chancellor of the Exchequer was brought into existence, partly to

¹ The *Dialogus de Scaccario* gives a description of the Upper Exchequer or Exchequer of Account which may be thus illustrated :—



It is plain that the position of Treasurer is one of less dignity than that of those who sat beside the Justiciar. His proper place would have been at right angles to the Justiciar, but that place was temporarily assigned to the Bishop of Winchester.

² Thomas, *Hist. of Public Departments*, 37.

³ Madox, *History of Exchequer*, ch. iv. s. 10.

take charge of the Seal of the Exchequer, partly to be a check on the Treasurer¹.

From the fall of Hubert de Burgh in 1232 the office of Justiciar rapidly lost importance, till, before the end of the reign of Henry III it disappeared. This further increased the importance of the Treasurer. In 1300 the Exchequer was fixed at Westminster, and the Treasurer and barons were forbidden to hear pleas between the King's subjects². The attempt to confine the jurisdiction of the Exchequer to revenue cases was evaded by fictions, and the judicial business which had been transacted before the barons in the Exchequer of Account passed to a definite Court—the Court of Exchequer. From the beginning of the fourteenth century a Chief Baron presided over this Court³.

Henceforth the office of the Treasurer increased in importance, but it is not till near the end of the sixteenth century that he became an officer of State so engrossed in the general policy of the country as to be unable to attend personally to the detail of his department. Lord Burleigh was the first to employ a secretary to communicate his instructions to the Exchequer of Receipt⁴. Before this time the title underwent a change⁵. The person holding the office had been called the King's Treasurer or the Treasurer of the Exchequer, but when he became the second officer in dignity after the Chancellor his title of King's Treasurer develops into that of Lord High Treasurer. He was also Treasurer of the Ex-

¹ Madox, History of Exchequer, ch. xxi. s. 3. The Chancellor of the Exchequer was not the 'lieutenant' of the Treasurer. The lieutenant was merely a deputy to whom the Treasurer might from time to time assign his duties. Madox, ch. xxi. s. 2.

² 28 Ed. I, 1, c. 4. This clause of the *articuli super cartas* did but enforce a rule the breach of which had been matter of frequent complaint. See Madox, ch. xxii. s. 2.

³ Haydn, Book of Dignities, 381. Madox, ch. xxi. s. 3. The title, 'capitalis baro,' seems to have been first used in the case of Walter Norwich in 1317.

⁴ Madox, p. 568. Report on Public Income and Expenditure (1869), i. 335.

⁵ Thomas, Hist. of Public Departments, p. 4.

The Exchequer.

The Lord High Treasurer.

³¹ Hen. VIII, c. 11.

chequer, but the offices were distinct: the first was conferred by delivery of a white staff, the second by patent; the first was a great office of State; the second placed him at the head of the Exchequer¹.

The Commission
of the
Treasury.

The office of Treasurer was first put into Commission on the death of Lord Salisbury in 1612. From this period, though the Treasurers transacted business in the Exchequer of Receipt until 1643, the Treasury has become a separate department; its authority is necessary for the issue of money from the Exchequer of Receipt, and it exercises the financial control once possessed by the Exchequer of Account. When at the Restoration the Treasury was not only put for a short time into Commission, but located in a separate set of rooms at Whitehall, the severance of Treasury and Exchequer was complete. The Upper Exchequer may by that time be said to have passed away into (i) a law court—the Court of Exchequer, (ii) a body of auditors, of whom I shall have to speak later, and (iii) a department—the Treasury. The office of Lord High Treasurer was filled from time to time until October 13, 1714, when the Duke of Shrewsbury resigned the white staff. Since then the Treasury has always been in Commission.

Severance
of
Treasury
and Ex-
chequer.

By the Act of Union with Scotland, the Scotch and English Treasuries were merged, but after the Union with Ireland the office of Lord High Treasurer for Ireland was continued until 1816².

The Treasury Board.

The Treasury Board is created by letters patent under the Great Seal³ appointing the persons named therein to be Com-

¹ See the account of the admission of Godolphin; Thomas, *Hist. of Public Departments*, p. 2; and of Harley, *Calendar of Treasury Papers*, vol. iv. preface. The first account is taken from the Black Book of the Exchequer; the second from an entry made on a fly-leaf of the Treasury Minute Book. It is difficult to conjecture from these accounts what would have been the duties of the Lord High Treasurer if the staff and the patent had been conferred on different persons.

² As to the inconveniences which arose from the existence of the two Treasuries, see Parker, *Memoirs of Sir R. Peel*, 111-114.

³ See the form of patent, Appendix i.

missioners for executing the office of Treasurer of the Exchequer of Great Britain and Lord High Treasurer of Ireland.

The Board consists of the First Lord, the Chancellor of the Exchequer, and a varying number of Junior Lords.

Until 1711, whenever the Treasury was put into Commission, the King named all the Lords, and the First Lord was only a more important minister than the others, 'primus inter pares'. Since 1711 the First Lord has nominated the Junior Lords, and since the Ministry of Sir Robert Walpole (1721-1742) the office of First Lord has usually been associated with the position of Prime Minister. The exceptions to this rule are of two kinds.

The Prime Minister as First Lord.

There have been occasions in the last century when there was no definite Prime Minister, as in the chaotic state of parties after the fall of Walpole, when Lord Wilmington was First Lord of the Treasury, while Carteret and Henry Pelham struggled for ascendancy in the Ministry, or again when William Pitt the elder was Secretary of State and controlled the policy of the country, while Newcastle distributed the patronage as First Lord of the Treasury; or again as in the coalition Ministry of 1783 when the Duke of Portland, who was First Lord, was Prime Minister only in name, and Fox and North divided the responsibilities of government.

Exceptions (1).

There have also been occasions when the Prime Minister has deliberately chosen an office either less or more laborious than that of First Lord. Thus Lord Chatham in 1766, when entrusted by George III with the formation of a Ministry, chose the office of Lord Privy Seal. At this time the Treasury Board met twice a week for the transaction of business, and Chatham was perhaps desirous of being relieved from these routine duties. Fox in 1806, and Lord Salisbury in 1885 and again in 1887 and 1895, have chosen to combine the duties of Foreign Secretary with those of Prime Minister. Such an arrangement seems hardly practicable nowadays, unless the Prime Minister is a member of the House of Lords.

Exceptions (2).

¹ Todd, Parl. Gov. in England, ii. 424.

To control the general policy of the country, to manage the business of the Ministry as leader of the House of Commons, and to superintend an important department of government, is a combination of duties hardly within the compass of one man's powers. Mr. Gladstone united the duties of Prime Minister and leader of the House of Commons with those of Chancellor of the Exchequer for a few months in 1873 and 1874 when Parliament was not sitting, and again from the spring of 1880 to the beginning of 1882, but this combination tends to become less frequent¹.

In 1885 the First Lord, Lord Iddesleigh, was neither Prime Minister nor a member of the House of Commons. The arrangement was anomalous, though the large experience of Lord Iddesleigh in matters of finance may have rendered it not inconvenient.

Duties of
First
Lord.

The First Lord of the Treasury has a large patronage but takes no part in the duties of the Treasury, unless questions should arise in the business of the department which the Chancellor of the Exchequer cannot settle; in such a case his position as titular head of the Board and as Prime Minister or leader of the House of Commons adds weight to his decision.

Business
of
Treasury
Board.

The Treasury Board does not now meet except on extraordinary occasions, but until the beginning of the present century its meetings were a reality². The Lords of the Treasury, and the Chancellor of the Exchequer, sat round the table, at the head of which the King, till the accession

¹ Pitt, Addington, Perceval and Peel are the only other instances in the last 100 years.

² In the reign of Anne the Board sat on four days of the week; on Monday, it dealt with Scotch and Irish business; on Tuesday, with the Treasurer of the Navy in the morning, Commissioners of the Customs in the afternoon; Wednesday, in the morning it made up the cash paper for the week, in the afternoon it waited upon the Queen to receive her approval of the cash paper, and to obtain her signature where necessary to warrants; on Friday, it received the Paymaster of the Forces and the Secretary of War in the morning, and the auditors and other officers of the revenue in the afternoon; Thursday was reserved being a 'council day,' and on Saturday the Board seems to have taken a holiday. *Calendar of Treasury Papers*, vol. iv. p. xv.

of George III, used to preside¹, seated in a large chair, which is still in the Treasury offices; the Secretaries attended with their papers; these were discussed and minutes kept by the Secretaries which were drawn out and read the next day. Business increased during the great wars of the last century, till it grew beyond the powers of a Board to transact; the meetings became formal, taking place twice a week; after 1827 the First Lord and Chancellor of the Exchequer ceased to attend; the business was prepared beforehand for the sanction of the lords². Since 1856 the meetings have been discontinued; individuals are now personally responsible for business which is transacted under the general control of the Chancellor of the Exchequer.

The Chancellor of the Exchequer.

The Chancellor of the Exchequer is always one of the Commission of the Treasury, but he is appointed Chancellor of the Exchequer and Under Treasurer by separate patents, and by the receipt of the Exchequer Seals.

His duties originally consisted in the custody and employment of the seal, in the keeping of a counter-roll which should check the accuracy of the roll kept by the Treasurer, and in the discharge of certain judicial functions in the Exchequer of Account, of which there remains but one, and that merely formal. The more strictly financial duties of the Chancellor of the Exchequer belong to the post of Under Treasurer, which was connected with his office in the reign of Henry VII³.

The post was not of great importance so long as the Treasury Board was in active working. Throughout a great part of the last century it was not necessarily a Cabinet office, unless held in conjunction with the first Lordship of the Treasury⁴.

¹ George III gave up the hereditary revenues for a fixed Civil List and so had no personal interest in the business of the Treasury.

² Commons Papers, 1847, xviii. 141-8. Evidence of Sir Charles Trevelyan.

³ Report on Public Income and Expenditure, 1869, part 2, p. 335.

⁴ Memoir of Right Hon. W. Dowdeswell. Cavendish Debates, 576.

Duties of
Chancellor of
the Ex-
chequer.

Recent
importance of
the office.

In 1809 Mr. Perceval offered the post to Lord Palmerston, who was then 25 years of age, and had made one speech in the House! 'Annexed to the office,' says the latter, 'he offered a seat in the Cabinet if I choose to have it, and he thought it better that I should have it.' Mr. Perceval added that as a matter of course he should take the principal share of the Treasury business both in and out of the House¹.

As the Treasury Board has diminished, so the Chancellor of the Exchequer has risen, in importance. At the present time he is in fact a Finance Minister with a Board to support him, of which Board either the Prime Minister or the leader of the House of Commons is the principal member. The importance of this support is obvious when we consider what are the duties which now fall upon the Treasury, of which the Chancellor of the Exchequer is the Parliamentary chief.

Change in
character
of its
duties.

The duties of the old Exchequer of Account and of the Treasurer were to the King. It was the business of the office to see that the King's debtors paid all that they owed, and that the King's creditors got no more than was their due. The duties of the Treasury and of the Chancellor of the Exchequer are to the taxpayer. It is the business of the department to see that no more money is asked for than is wanted, and that no more money is spent than has been authorized by Parliament. The estimates are supervised in the Treasury before they are presented to Parliament, and Bills which lay a charge on the Consolidated Fund or on money which Parliament is to provide, require the assent of the Treasury before they can be introduced into Parliament. If this were not so the Chancellor of the Exchequer would not be able to balance revenue and expenditure. Besides this, the Treasury exercises a general control over official salaries, fixing them in the first instance, and taking care afterwards that work which is paid for is actually done. It is responsible not merely for the amount demanded of the taxpayer but also for the expenditure of public money in the

To settle
what shall
be asked
for :

¹ Bulwer, *Life of Palmerston*, i. 91.

mode indicated by Parliament. With this I shall deal here-
 after. It is impossible for the Chancellor of the Exchequer
 to attend personally to these matters in detail, they are
 supervised by the permanent staff of the department; but
 the policy which governs the action of the department is
 indicated by the Chancellor of the Exchequer.

to see
 that
 public
 money is
 properly
 spent:

And he has other duties. It is his business when he knows
 the amount of the public income, and the extent of the
 demands upon it, to adjust revenue to expenditure, to raise or
 remit taxation as the occasion may justify, and to discover
 how money may be raised in greatest plenty, with least
 inconvenience.

to adjust
 taxation
 to outlay:

Furthermore, it is his business to obtain the assent of Parlia-
 ment to his plans for the taxation of the year, and assisted
 by his Parliamentary Secretary to represent the department
 in the House of Commons. The Chancellor of the Exchequer
 and his staff may be regarded as living in perpetual conflict
 —with servants of the State, who want more pay than the
 Treasury thinks they are worth—with departments of
 government, which want more money than the Chancellor is
 prepared to ask Parliament to grant—with the House of
 Commons which contests the amount demanded, and the
 mode in which it is proposed to be raised—and with the
 taxpayer who wishes to have everything handsome about him,
 and does not like to pay for it.

to repre-
 sent his
 depart-
 ment in
 Parlia-
 ment.

It remains to consider the remnant of the Chancellor's
 judicial powers. The Chancellor and Treasurer were entitled
 to sit with the Barons of the Exchequer when that Court
 sat as a Court of Equity. Sir Robert Walpole sat and gave
 a casting vote in 1735. But the Equity jurisdiction of the
 Court was taken away in 1841, and the Judicature Act 5 Vict. c. 5.
 excludes the Treasurer and the Chancellor of the Exchequer
 from judicial powers in the High Court or Court of Appeal.
 36 & 37
 Vict. c. 66,
 s. 96.

His
 judicial
 powers.

But in the appointment of Sheriffs the Chancellor resumes
 his old place as though in the Exchequer of Account. The
 ceremony which takes place on the 12th of November, the

The ap-
pointment
of Sheriffs. tomorrow of St. Martin, recalls the ancient Exchequer, wherein the Sheriffs were the connecting link between the shiremoot and the Curia. Not only are the Judges summoned for this appointment, but all the members of the Cabinet. The justiciarii and great officers of State sit once more on the Exchequer side of the Curia, only the Exchequer and its Barons have gone, and the Chancellor of the Exchequer finds himself presiding in the Queen's Bench division of the High Court of Justice¹. The Queen's Remembrancer reads out the names on the list for the ensuing year, the Judges supply names sufficient to complete the number of three for each county, the Clerk of the Privy Council reads out excuses, and the Lords of the Council and Judges accept or reject the excuses. The list is made out, and the subsequent proceedings take place at the Privy Council².

The Parliamentary Staff.

The
Junior
Lords.

The Junior Lords who, with the First Lord and Chancellor of the Exchequer, make up the Commission of the Treasury, are usually three in number, and there is a tradition, not uniformly observed, that there should be an English, a Scotch and an Irish Lord. They have from time to time some departmental business assigned to them, and to one is specially entrusted the consideration of claims of public servants to superannuation allowances. But their duties are mainly political; they act as assistant whips and help the Patronage Secretary, the senior whip, to bring up the rank and file of the Government supporters when required for a division.

The
political
side,

It will be seen that the Treasury as at present constituted has two sides, a political and a financial; the political repre-

¹ 44 & 45 Vict. c. 68, s. 16.

² The Sheriffs Act, 50 & 51 Vict. c. 55, does not require that more than one great officer of State should be present, and two judges. Practically it is necessary that six or seven judges should attend. Report of Select Committee of Lords on the office of High Sheriff, Com. Papers, 257, 1888. The Lords of the Council determine the order in which the names shall stand, and at a subsequent meeting the Queen pricks the name selected for each county.

sent by the First Lord and the Junior Lords, the financial by the Chancellor of the Exchequer. The First Lord is either Prime Minister or leader of the House of Commons, or both (for we leave out of account the anomalous arrangement of 1885), and is entrusted with the extensive patronage of the Treasury. Each of these great officers has a Parliamentary Secretary. The Patronage Secretary is the subordinate of the First Lord, assists him in the distribution of the patronage of the Treasury, and acts as the chief Government whip, attending to the maintenance of the Government majority in and out of Parliament.

The Financial Secretary is the subordinate of the Chancellor of the Exchequer. He is usually responsible for the estimates for the revenue departments and the civil service, and for votes of credit; he has to do the drudgery of the financial business transacted in Parliament, to take charge of Bills which affect the Revenue, and to defend the estimates laid before the House of Commons.

The history of these last-mentioned officers is somewhat obscure. Lord Burleigh appears to have been the first Treasurer who employed a Secretary to give his instructions to the Treasury. The first notice of joint Secretaries was, when Lord Rochester was Treasurer in the reign of James I; after that there was but one until 1714, when there were again two. From the commencement of the last century the post was held with a seat in the House of Commons¹. Since then they have generally, and for some time past always, been members of the House. Their offices are not places of profit *under the Crown*, and they are appointed simply by being 'called in' to the Treasury Board.

The Permanent Staff of the Treasury.

So far I have spoken of the Treasury as a body of political officers, some connected very remotely, if at all, with the

¹ See, as to the history of the Secretary to the Treasury, Thomas, *Hist. of Public Departments*, 16, 17.

management of the public Revenue and Expenditure, others, such as the Chancellor of the Exchequer and the Financial Secretary, concerned with the general scheme of our financial policy, or with its exposition and conduct in Parliament.

The Per-
manent
Secretary

But these political officers who change with the rise and fall of parties are the temporary chiefs of a permanent staff. The practical inconvenience of frequent change in the Secretaries of the Treasury was felt in 1805, and was met by the creation of a Permanent Secretary, whose office is incompatible with a seat in Parliament, whose duty it is to supervise the daily work of the Treasury, and to inform and assist the Parliamentary representatives of the department.

and staff.

The wide-reaching financial control exercised by the Treasury over all the departments of government, gives a peculiar importance to its permanent staff; for all estimates must be approved by the financial head of the Treasury, the Chancellor of the Exchequer, and the details of these estimates must necessarily be scrutinized by the persons who are from long experience familiar with such matters, and can supply the Chancellor with materials for forming conclusions. All expenditure must, in one form or another, receive the authority of the Lords of the Treasury. Statutory control is given to the Treasury in respect of the form of keeping the public accounts; and in other matters of departmental expenditure the Treasury possesses, either by Statute, by custom, or by arrangement, a wide supervision.

This control can only be efficient, or even possible, by reason of the permanence of the body of officials who exercise it. Economy can only be maintained by constant watchfulness over the springs and sources of expenditure. It would be idle to expect officials, who were dependent for their position on the continued existence of a government, to take up the threads of departmental policy just where their predecessors had laid them down, to incur the unpopularity which is the lot of the economist, without the prospect of seeing the fruits of their labours. The importance of the permanent Civil

Service will be dealt with later: but it is impossible to conclude an account of the Treasury and its powers without alluding to the necessity to such a department of a skilled and permanent staff.

In close connexion with the Treasury are several departments of government. The reason of such connexion differs in the different cases, as does the character of the connexion. Of some of these departments I shall have to speak later in dealing with the revenue and expenditure of the Crown.

The Comptroller and Auditor-General is an official independent of any government department, but discharging functions which keep him in constant communication with the Treasury: for the departments of government cannot obtain money without the intervention of the Treasury, and the Treasury cannot supply their needs or check their expenditure without the aid of the Comptroller and Auditor-General.

The other departments which are in immediate connexion with the Treasury are of two kinds. First, those which are concerned with the collection of the revenue: such are the Commissioners of Customs; of Inland Revenue; of Woods and Forests, i.e. of the Land Revenues of the Crown; and the Postmaster-General.

Secondly, those which are concerned with the expenditure of the public money, either ministerially, as in the case of the Paymaster-General¹ and his staff, or on certain matters of public use, ornament, or convenience. Under this last head fall the offices of First Commissioner of Works and Public Buildings and of Deputy Master of the Mint; of the staff of the National Gallery and National Portrait Gallery; of the *London Gazette*, which gives authentic information of

Departments
connected
with
Treasury.

Control
and
Audit.

Collect-
ing of
revenue.

Expendi-
ture of
public
money on
public
objects.

¹ The office of Paymaster-General has by successive Statutes, 5 and 6 Will. IV, c. 35, and 11 and 12 Vict. c. 55, absorbed all the offices through which public money voted by Parliament was previously paid. The office is political, but honorary. The duties are discharged by the permanent staff of the Pay Office, with powers granted by the Paymaster-General.

acts of State; of the Parliamentary Counsel who endeavour so to draft the Bills containing the Government measures as to defy the unskilled ingenuity of the private member; of the Civil Service Commissioners who conduct the examination of candidates for 'junior situations in any of Her Majesty's Civil establishments.' The nature of the control exercised by the Treasury over these offices varies very much. In some cases the Prime Minister recommends to the Queen the appointment of the departmental head, while the First Lord appoints the staff, and its numbers and emoluments are controlled by the Treasury. In others, the appointment of the chief and his staff, or some of them, rests with the First Lord.

The Heads of the Post Office and the Board of Works are political personages, changing with the change of government. Others of these departments are wholly composed of members of the permanent Civil Service. Of some it will be necessary to speak more in detail hereafter. Others must merely illustrate the character of the Treasury control over the public services.

§ 6. *The Post Office.*

The Postmaster-General is a political officer appointed from time to time by letters patent under the Great Seal.

History of
Post Office.

From the early part of the sixteenth century it would seem that postal arrangements existed, not for public convenience, but for the use of the King and his Court, and these were under a Master of the Posts. In the reign of James I and Charles I posts were organized for general convenience, and from the reign of Charles II they furnished an appreciable item of the revenue settled upon the King. But until 1710 the duties were carried on by one or more persons under the supervision of a Secretary of State.

The Post-
master-
General,
9 Anne,
c. 10.

In 1710 a Postmaster-General was appointed, holding office by Letters Patent: and the office fell under the disabilities attaching to new offices by the Place Bill of 1707. Throughout the last century, and until 1823, the office was held usually

by two joint Postmasters; since then it has been held by one person. Except for the short period of Mr. Canning's Ministry, it was always held by a peer, with a view to the Parliamentary representation of the Post Office, until in 1866 the disability was removed and the Postmaster-General rendered capable of sitting in Parliament, subject to the rule that acceptance of the office vacates the seat of the holder, leaving him eligible for re-election.

may sit in
Commons,
29 & 30
Vict. c. 55.

In 1831 the English and Irish Post Offices, which had until that date been under separate management, were brought under one head, and since 1837 the office of Postmaster has been regarded as political, changing hands with changes of Ministry.

The year 1837 marks an epoch in the history of the Post Office. In that year a group of Statutes was passed, one of which repealed in its entirety the immense mass of legislation which had then accumulated about the Post Office, while another defined its privileges and conditions of management. It is the latter Act which gives a monopoly to the Post Office in the carriage of letters and newspapers: private enterprise is not allowed to compete with the Government, although in the process of crushing private competition the Post Office may be stimulated to new efforts for meeting the public convenience.

Privileges
of Post
Office.
7 Will. IV.
& 1 Vict.
c. 32.
Ibid. c. 33.

The position of the Postmaster-General is exceptional. From one point of view the office is a department of the Revenue; but, unlike other such departments which are merely concerned with collection and receipt, the Post Office is a business, immense in compass and variety, conducted primarily with a view to the public convenience, but incidentally producing revenue, and it is under this heading that I will hereafter mention the various duties undertaken by the office.

Position
of Post-
master-
General :

Post, ch.
vii. sect. i.
§ 5.

The Postmaster-General is therefore at the head of a great administrative office, but, though he may suggest and advocate means for increasing the usefulness of his department, his powers are conferred and very precisely defined by Statutes,

his power
limited by
Statute :

and their exercise, wherever it goes beyond mere regulation and touches the Revenue, is subject to Treasury control.

subject to
Treasury
control.

His power to fix rates of postage where they are not settled by Parliament must be used subject to the approval of the Lords of the Treasury. So too Parliament gives authority for contracts for the conveyance of mails; but if Parliament does not fix the rates, they must be settled by the Postmaster-General, with the consent of the Treasury.

His regulations as to the Post Office Savings Banks, and money-orders, are in like manner subject to the approval of the Treasury, and the consent of that department is required to enable him to purchase, sell, or exchange land, and to purchase, lease, or regulate the business of the Telegraph¹.

His position is in this respect different to that of the other chiefs of great spending departments. The Treasury has a voice in the amount of the sums asked of Parliament for the various services of the army and the fleet, but the assent of the Treasury is not required to the pattern of a new rifle or the design of a ship. In the department of the Postmaster-General Parliament lays down the rules of management in great detail, and leaves it to the Treasury to see that these rules are carried into effect. The Postmaster-General is no more than the acting manager of a great business, with little discretionary power except in the exercise of the very considerable patronage of his office. He may suggest to the Government an extension of postal arrangements with foreign countries, which the Queen may effect by treaty: but it is in his place in Parliament alone that he can introduce new methods for the conduct of his business, or new departments of work to be undertaken by his office. And it is from his Parliamentary position that his office derives the influence which gives it importance.

¹ I have not attempted to give references to the numerous Statutes by which the powers of the Postmaster-General are conferred and defined. Such information may be found in the Chronological Table and Index to the Statutes.

§ 7. *The Admiralty Board.*

The Admiralty Board, like the Treasury Board, represents ^{the Admiralty Board,} a great office entrusted from time to time to Commissioners appointed by Letters Patent under the Great Seal. The office is that of Lord High Admiral, and it has been in Commission since 1708, except in the year 1827, when for a short time the Duke of Clarence was Lord High Admiral.

But before 1832 the Admiralty Board was not entrusted with the entire management of naval affairs: it dealt with 'the appointment and promotion of officers, the movements of ships, and the general control of the policy of the navy¹.' There were two Boards subordinate to it, the Navy Board, ^{Navy Board,} which dealt with pay and stores, other than ordnance, or victuals, and the Victualling Board, ^{Victual-ling Board,} which attended to the supply of meat, biscuit, and beer; besides these the Treasurer of the Navy, though a member of the Navy Board, had a separate office; he obtained from the Treasury and paid over the sums which the Navy Board directed him to pay².

In 1832 Sir James Graham, then First Lord of the Admiralty, obtained the passing of an Act which abolished these ^{combined by 2 & 3 Will. IV, c. 40.} two Boards and placed their duties in the hands of officers each of whom was subordinate to a Lord of the Admiralty. Three years later the office of Treasurer was abolished, and ^{Treasurer. 5 & 6 Will. IV, c. 35.} its duties assigned to the Paymaster-General.

Thenceforth the entire business of the Navy has been conducted under the supervision of the Admiralty Board. The Letters Patent constituting the Commission of the Admiralty, after revoking the previous Patent, appoint certain persons named to be Commissioners for executing the office of Lord High Admiral, with power to do everything which that officer might do, if in existence, to discharge all the duties

¹ Report of Royal Commission to enquire into civil and professional administration of naval and military departments, 1890 [c. 5979], Appendix i.

² The Laws, &c. of the Admiralty of Great Britain civil and military, vol. ii. p. 410 (published 1746).



which had once been done by the Navy and Victualling Boards, and to make all appointments, not only professional, as the Lord High Admiral had been wont to do, but in the civil departments of the service.

It will be necessary hereafter to speak again of the Admiralty and its working in a chapter on the Armed Forces of the Crown, but at the risk of repetition some points may be mentioned here.

The Board
and the
Com-
mission.

The Board as at present constituted consists of a First Lord, four Naval Lords, one of whom is Controller of the Navy, and a Civil Lord, a Financial Parliamentary Secretary, appointed by the Board, who changes with a change of Government, and a Permanent Secretary, who holds his office independent of political changes. But the *Board* is not co-extensive with the *Commission* of the Admiralty. It includes these two Secretaries who are not named in the Patent.

Its meet-
ings.

(1) The Board now meets usually once a week or oftener if the First Lord so pleases. In former times it met more frequently, but much of the administrative work is now done independently by the Lords in their respective departments.

Its mem-
bers and
the First
Lord.

(2) Lords Commissioners are nominally on an equality: the Patent makes no distinction in their respective positions: the First Lord is only *primus inter pares*, and every order of the Board must come from two or more members. But in fact the First Lord is supreme, and for two reasons.

The First Lord has for a very long time been a Cabinet Minister, he has therefore the force of the Cabinet behind him. If the other Lords differ from him at the Admiralty Board he can say that unless his wishes are carried out he will not remain a member of the Board¹. If, as would be probable, the other members of the Cabinet support the First Lord against his colleagues, the Queen would be advised to issue fresh Letters Patent constituting a new Commission of

¹ Report of Select Committee of the Commons on the Board of Admiralty, 1861, p. 185. Evidence of Sir John Pakington.

the Admiralty, in which other names would be substituted for those of the dissentient members of the Board.

Again, Orders in Council of 1869 and 1872 make the First Lord responsible to the Queen and to Parliament for all the business of the Admiralty. This does directly for the First Lord what his position as a Cabinet Minister enabled him to do indirectly. He has to answer for every detail of Admiralty administration: he is therefore entitled to insist that he shall not be made responsible for action of which he does not approve. And the order of 1872 does not only enforce the responsibility of the First Lord, it makes the other members of the Board responsible to him for the business of their respective departments.

(3) There seems to be some difficulty in defining the matters for which the whole Board is responsible and those for which individuals are responsible; and a further doubt whether it is the duty of every member of the Board not merely to give advice when asked for by the First Lord, but to state, unasked, what they consider the requirements of the country to be ¹.

(4) The distribution of business among the members of the Board is in the hands of the First Lord. The matter may be postponed to another chapter.

(5) Of the two Secretaries to the Admiralty, the Political and Parliamentary Secretary is responsible for finance, estimates, and the purchase and sale of stores; the Permanent Secretary for discipline, recommendation for appointments and promotion, and correspondence. But there is besides a large permanent staff. The Admiralty is constituted with the object of securing responsibility to Parliament by entrusting the affairs of the navy to a civilian who shall represent the department in one or other House, while care is taken to supply this civilian minister with the best professional advice. As regards the general policy of the Board

¹ Report of Royal Commission on naval and military departments, 1890, App. i. 5, evidence of Sir A. Hood.

this advice comes through the Naval Lords, who change with changes of government: in matters of detail the First Lord has the assistance of an efficient permanent staff in all the numerous departments of naval administration.

SECTION III.

REGULATIVE OFFICES.

It is not easy to classify the departments of government which remain, but there is one large and distinct group which consists of a number of Boards. These, unlike the Treasury Board and the Admiralty Board, do not represent great offices put into Commission; in earlier times they would have been Committees of the Privy Council; the oldest of them, the Board of Trade, has never, strictly speaking, ceased to be such a Committee. But the Boards are in most cases phantoms; and the President of each Board, though by its statutory constitution he would play a minor part among the great officers of State of whom the Board consists, is, in fact, the sole head of his department. These Boards are not merely indications of diminished administrative importance of the Council. They mark also the increased activity of the State in compelling or controlling the action of the individual in many departments of human affairs.

§ 1. *The Board of Trade.*

History of
the Board.

This Board has a long history. In 1660 Charles II created two Councils, one for Trade and one for the Foreign Plantations. These were combined under one Commission in 1672, which being revoked in 1675, the control of trade returned to the Privy Council. In 1695 the Board of Trade and Plantations was created. This Board was abolished in 1781. The sarcasms of Burke¹ on its costliness and inefficiency were doubtless justified; but the Board would seem to have had difficulties from a want of executive power, which might account for its incapacity. It could collect information and

¹ Burke, Speech on Economical Reform; but see *Life of Shelburne*, by Lord E. Fitz-Maurice, i. 240.

make suggestions to the Secretary of State for the Southern Department, but it could do no more, and in the hands of persons not naturally very zealous to give a return of work for their salaries, it became an expensive machine for making inquiries which were seldom made, and for having in readiness advice which was seldom asked for. From 1782 until the present time the Board of Trade has been a Committee of the Privy Council, constituted by Order in Council at the commencement of every reign, and consisting of a body of great officials with a President and, until 1867, a Vice-President¹. This Board rarely met, and the duties of President and Vice-President were too nearly akin for a convenient arrangement of their business.

In 1862 it was enacted that the Committee of Council should henceforth be described as the Board of Trade², and in 1867 the Vice-President ceased to exist, and a Secretary was appointed. The President and Secretary are both capable of sitting in the House of Commons.

The duties of the Board before 1840 were almost entirely consultative, it collected statistics on the subject of trade, and was ready to offer advice to the Foreign Office on the subject of commercial treaties, and to the Colonial Office on questions arising out of our dealings with the colonies. In 1840 it began to acquire its modern executive functions; it was then for the first time called upon to settle and approve the by-laws of railway companies. Its duties in this respect grew, and for some time the department had a double aspect. It was the Committee of Council for trade and foreign plantations; in this capacity it met to consider and report to the Colonial Office upon the constitutions proposed for our colonies in Africa and Australia³. It was also the Board of Trade, and in this capacity the President and Vice-President exercised an administrative control over railways, harbours, and other

Its consultative duties.

¹ See Return to an Order of the House of Commons for 1871 [482].

² 25 & 26 Vict. c. 69, s. 2, and see 52 & 53 Vict. c. 63, s. 12.

³ Hansard, cvi. 1120.

matters committed to the Board by Statute. Gradually the consultative functions dwindled, and the administrative functions grew. In 1865, after some discussion as to the relation of the Foreign Office and the Board of Trade, the former department established a new division to carry on correspondence in commercial matters, not only with the Board of Trade, but with representatives of foreign powers in England¹; and a few years later, in 1872, the consultative branch of the Board wholly disappeared².

Its regu-
lative
duties.

We have then to consider what are the present duties of the Board as an executive and regulative office rather than as an advising body.

Statistics.

The part of its present work which most nearly represents the old functions of the Board as an adviser in trade and colonial matters is the statistical department. It collects and publishes the statistics of the trade of the United Kingdom, the colonies, and foreign countries, and of agriculture, including the average price of corn in England and Wales, calculated from weekly returns. In this department too is kept a register of the rates of duty levied by foreign countries on British goods. In general it may be said that persons in search of statistical information on the subject of trade and navigation will obtain it at the Board of Trade.

Beyond this it may be said that wherever the State regulates trade in the interest of the public safety, convenience, or profit, it is represented by the Board of Trade³.

In some matters the Board exercises ancient royal prerogatives transferred by Statute to departments of government. In others it represents the modern activity of the State.

Patents.

The ancient claim of the Crown to create monopolies in the buying, selling, making or using commodities, was

¹ Hansard, clxxvii. 1880.

² Hansard, ccix. 1150.

³ I do not attempt to refer the reader to any but the most important of the vast accumulation of Statutes whence the Board derives its powers. The Chronological Table and Index to the Statutes must be referred to for further information.

limited by an Act of James I to the grant of Letters Patent for the exclusive use of new inventions¹. This prerogative has been regulated by subsequent Statutes : and the grant of patents together with the registration of designs and trade marks is now placed under the superintendence of the Board of Trade².

Upon the commercial department is thrown the duty of Standards. keeping the standard of weights and measures, formerly the business of the Exchequer. The entire machinery of Bankruptcy, apart from the consideration of legal questions, is in the hands of the Board³; so is the registration of Joint Stock Companies, conducted by a separate office, but one included in the railway department, of which something must be said.

The powers and privileges conferred upon companies which provide things of indispensable use or convenience are generally speaking exercised under the control of the Board.

Such bodies are railway and tramway companies, gas and water companies. They are in possession of a practical monopoly of things which man cannot do without—light, water, and the means of locomotion. The State entrusts to the Board of Trade the task of seeing that these bodies act with due regard to the interest and to the safety of the public. Safety would seem to be the main object of the control exercised by the Board over electric lighting. The control is exercised in various ways.

Where legislation by private bill or provisional order is required to effect the objects of the company, a government department can effectively intervene. When the company is in possession of its powers, it is controlled by inspection of works, by approval of by-laws and regulations, by inquiry into accidents.

The Harbour department is one in which the Board exercises an ancient royal prerogative. The soil of ports and navigable rivers was under the feudal land law vested in the

¹ 21 Jas. I. c. 3.² 46 & 47 Vict. c. 57.³ 46 & 47 Vict. c. 52.

Crown. This right of ownership involved a duty to secure the safety of the country from hostile invasion and the due payment of revenue arising from the Customs.

These prerogatives re-appear in the departments of government which have charge of ports. The Commissioners of the Treasury determine what shall be landing-places for merchandise, the Board of Trade has charge of harbours, subject to the intervention of the Admiralty where national safety is concerned, and of the Commissioners of Woods and Forests as regards the pecuniary interests of the Crown in the soil¹. Closely connected with its responsibility for the maintenance of harbours is its control over the bodies to whom is entrusted the business of managing lighthouses², and the funds for their maintenance. Less closely connected, but of the same character, is its power of regulating sea fisheries.

Light-
houses.

The Marine department offers a very complete representation of State control over commercial transactions.

Merchant
shipping.

A merchant ship when built is measured, her name entered with a description of her in the books of the Board, and a certificate of registry given to her owner which is henceforward the evidence of her identity and nationality; the register is, in addition, the owner's title, and this does not merely put his title under the protection of a department of government, it enables him by a change of the registered name to convey his ship to another with the minimum of expense.

The safety of ship and crew is the next concern. 'The officers of a merchant ship are required to pass examinations in technical proficiency, and to produce evidence of character; they then receive certificates enabling them to act as masters, mates, and engineers³.' Certain rules are made and enforced by the Board for the conduct of officers and men,

¹ 25 & 29 Vict. c. 69.

² These are the Trinity House in England, the Commissioners of Northern Lighthouses in Scotland, and the Commissioners of Irish Lighthouses for Ireland.

³ The State in its Relation to Trade, Sir T. Farrer, p. 123.

for the settlement of disputes, and for the discharge of the crew, with their due wages if at home, with means of return if discharged abroad.

Besides securing that the ship shall be competently officered and manned, the Board makes rules as to the number of passengers, the lights to be shown, and the boats to be carried, the position in the ship of certain sorts of cargo; and it is further invested with power to detain ships which are suspected of being unfit to go to sea.

The Finance department of the Board is the outcome of all the above mentioned duties. The staff required to effect this elaborate supervision, the maintenance of harbours and of lighthouses, the arrangements for merchant seamen's savings banks, money orders, pensions for the relief and conveyance home of distressed seamen, for the custody and transmission of the wages and effects of deceased seamen—all these matters involve not merely the keeping of accounts, but the administration of funds. The financial business of the Board involves therefore considerable labour and some cost¹.

§ 2. *The Board of Works.*

The Board of Works is the creation of Statute. In 1832^{14 & 15} the management of public works and buildings was assigned^{Vict. c. 42.} to the Commissioners of Woods and Forests, a body primarily concerned with a department of revenue, the Crown lands. The Commissioners, as was inevitable, used part of the produce of the Crown lands to maintain the public parks and buildings in their charge, and handed over the balance to the Exchequer. As it was desirable to keep these two items of expense and revenue apart, the departments were severed in 1851, and the Board of Works and Public Buildings was created, consisting of a First Commissioner, the Secretaries of State, and the President of the Board of Trade. The First Commissioner may sit in the House of Commons, and the

¹ See Return to an Order of the House of Commons for 1871 [48a].

Commissioners of Woods and Forests were by the same Statute declared ineligible for seats in that House.

The First
Commissioner.

The First Commissioner is appointed by warrant under the royal sign manual: he acts alone; the Board never meets unless it should so chance that the office of First Commissioner was vacant, and business had to be done.

His duties.

The First Commissioner, then, with or without his Board, has charge of royal palaces and parks, and beyond this he has charge of all public buildings which are not specially assigned to any other department.

But as a rule each department looks after its own buildings, and the First Commissioner of Works is practically concerned with the beauty and convenience of the parks and public buildings of the metropolis.

§ 3. *The Local Government Board.*

34 & 35
Vict. c. 70.

The Local Government Board is the creation of an act of 1871, by which the powers possessed by the Privy Council, by the Home Secretary, and by the Poor Law Board in respect of public health, local government and the administration of the poor law, were transferred to a Board consisting of the Lord President of the Council, the Secretaries of State, the Lord Privy Seal, the Chancellor of the Exchequer, and a President, to be appointed by the Queen, and to hold office during pleasure.

Ch. 5.
sect. i. § 5.

To this Board was given power to appoint Secretaries, Inspectors, and the necessary staff, with the sanction of the Treasury. The President and one of the Secretaries were made eligible for a seat in the House of Commons. As I shall have to deal hereafter with the government of the United Kingdom, central and local, I will leave for consideration at that point the duties and powers of the Local Government Board, merely saying here that, as in the case of the Board of Works, the Board does not meet, and that the management of its business is vested in the President and Parliamentary Secretary.

§ 4. *The Board of Agriculture.*

The Board of Agriculture is the youngest of the departments of government. It dates from the year 1889. Like its brethren the Boards of Trade, Local Government and Works, it consists of a number of distinguished persons who never meet, of a President, who may sit in the House of Commons, as its political chief, and a permanent staff.

It does not represent to any great extent a new interference by the State with the ordinary business of life. The Act which constitutes it does no more than assign to a Board powers exercised by various bodies, create a new office so as to enable the exercise of those powers to be represented and criticized in Parliament, and impose a liability to collect and publish agricultural statistics, and to promote agricultural study.

The Board of Agriculture has acquired these from two sources, the Privy Council and the Land Commissioners.

From the Privy Council it has taken the Powers, with which the executive was invested by the legislature of 1877, for the destruction of the Colorado beetle, and those which have been conferred by various Acts for preventing the spread of contagious disease among animals.

The Land Commissioners are wholly absorbed and disappear in the Board of Agriculture, having themselves accumulated the powers and duties of other Boards. The commutation of tithe, the enfranchisement of copyhold, and the enclosure of commons, took place under the provisions of various Statutes, the operation of which was subject to the control of bodies of Commissioners. So, too, were the powers of limited owners of real property to pledge the credit of the land which they enjoyed for drainage or other purposes of improvement, or to employ for such purposes the produce of sale of such property effected under the Settled Land Act. So, too, were the powers of the Universities and the Colleges therein to deal

with property in the management of which the public was supposed to have an interest.

All these powers had been concentrated in a body of Commissioners, who were not represented in Parliament. They are now transferred to a Board¹, which has a Parliamentary representative. The only new power created by the Act is a control with which the Board is invested over dogs for the purpose of muzzling them at its pleasure, or making rules for their detention or even destruction if they stray.

§ 5. *The Committee of Council on Education.*

Character
of the De-
partment.

This branch of State regulation needs a brief notice. It is a department of government, which illustrates more vividly than any other, the extent to which the State interferes with the action of the individual in a matter which seems so essentially one of private judgement as the education of children. It is a department with Parliamentary chiefs at its head, and thus directly responsible to Parliament. It is a Committee of the Privy Council, existing not to advise but to compel and to control, in fact to carry on a regulated interference with the affairs of daily life.

Its
history.

When first the State came in contact with education, in 1830, it contributed, by a grant of £20,000 a year, administered through the Treasury, sums in aid of voluntary contributions for public elementary education. In 1839 the grant was enlarged to £30,000, and the duty of administering it was transferred to a Committee of the Privy Council. This Committee developed into a department, and in 1856 the Queen was empowered by 19 & 20 Vict. c. 126 to appoint a Vice-President of the Committee of the Privy Council on Education, who should be capable of sitting and voting in Parliament. Thus was created a Minister of Education, responsible to Parliament. The duties of this Minister have increased with the increased insistence of the State on the education of its citizens. The Act of 1870 put compulsion

¹ 52 & 53 Vict. c. 30.

upon parents to send their children to elementary schools, and upon districts to provide schools either by voluntary effort, subject to government inspection, or by the creation of a School Board, and the imposition of a rate. The taxpayer helps alike the voluntary and the involuntary contributor, the subscriber and the ratepayer, through the government grant given to individual schools under conditions differing as educational theory changes. But with these we are not here concerned. It is enough to note the constitution of the Education Office. It is a Committee of the Council, but its head is the Lord President of the Council, and not, as in the case of the Board of Trade, a President for that particular committee. Nor has the course of its history followed that of the Board of Trade. It has remained a Committee of Council, and has never become an independent department with a President and a Parliamentary Secretary.

The Lord President attends to the business of the department, and is prepared to take responsibility for its action as its official chief, but the Vice-President, who represents it in the House of Commons, is mainly responsible, is, in fact, the Minister of Education.

§ 6. *The Chancellor of the Duchy of Lancaster.*

The Chancellor of the Duchy of Lancaster is the representative of the Crown in the management of its lands and the control of its courts in the Duchy of Lancaster, the property of which is not confined to Lancashire but is scattered over various counties.

These lands and privileges have always been kept separate from the hereditary revenues of the Crown, though the inheritance has been vested in the King and his heirs. The palatine rights of the Duke of Lancaster were distinct from his rights as King, writs and indictments ran in his name, the peace of the Duchy was his peace and not the King's, the Courts were his Courts and he appointed the Judges. The Judicature Act has left only the Chancery Court of the Duchy,

Its constitution.

Historical position of the Duchy.

but the Chancellor appoints and can dismiss the County Court Judges and their subordinates within the limits of the Duchy. Beyond this he is responsible for the management of the land revenues of the Duchy, which are the private property of the Crown, and he has charge of the Seal of the Duchy. He is appointed by letters patent and his salary comes from the revenues of the Duchy and not from the Consolidated Fund.

In fact the office, except for some formal business, is a sinecure, since the judicial and estate work of the Duchy is done by subordinate officials. The Chancellor is usually a Minister whose advice or assistance is necessary to a Government, although he may from health or other reasons be unable to undertake the charge of an exacting department.

§ 7. *The Irish Office.*

The Lord
Lieutenant.

Theoretically the executive government of Ireland is conducted by the Lord Lieutenant in Council, subject to instructions which he may receive from the Home Office of the United Kingdom. Practically it is conducted for all important purposes by the Chief Secretary to the Lord Lieutenant.

The Chief
Secretary.

The contrast in the history and legal position of this officer with that of the Secretary for Scotland is curious. The latter owes his existence to Statute, which gives him his title, powers, and duties. The former does not often appear in the Statute book. An Act of 1817¹ says that he is to keep the Privy Seal in Ireland, an Act of 1872² makes him President of the Irish Local Government Board, and from time to time his signature or other act is expressed to be of equal validity with that of the Lord Lieutenant.

Character
of Irish
government.

Scotland was wholly separate from England until the Union of 1707, and when united the two kingdoms were wholly united. Ireland has always been in the position of a dependency to which from 1782 until 1800 legislative independence was conceded. Its separation from England by the sea has further contributed to keep up the apparatus of a provincial

¹ 57 Geo. III, c. 62, s. 11.

² 35 & 36 Vict. c. 69, s. 3.

government; so that while Scotland has been governed directly from the Home Office, Privy Council, and other central departments, those same departments, in so far as they were not reproduced in Ireland, have communicated to the Lord Lieutenant the instructions of the central government.

Thus the office of Chief Secretary has varied in importance from time to time. When Ireland had a Parliament, still more when it had an independent Parliament, the Chief Secretary was to the Lord Lieutenant what a Secretary of State is to the Crown, the exponent of the pleasure of the supreme executive. Secretaries have varied in importance.

After the Act of Union the Lord Lieutenant governed Ireland subject to instructions from home, and his Chief Secretary, sitting in the House of Commons, explained matters which concerned local government. Thus when Sir Arthur Wellesley took a military command in Portugal in 1808 he did not give up the post of Chief Secretary, but employed Mr. Croker to explain to the House of Commons such Irish business as might arise during his absence¹.

But as the business of departments has multiplied, the Home Office has ceased to deal with the details of Irish administration²; and as communication has become easier, the formal apparatus of Irish government has become less necessary. The Lord Lieutenant represents the splendour and carries out the formality of the executive government, the Chief Secretary conducts the business of the department. Sometimes one, sometimes the other, is in the Cabinet, but not both. The Lord Lieutenant may have special experience Irish Office increases in independence.

Relations of Lord Lieutenant and Chief Secretary.

¹ Croker Correspondence, i. 12.

² Sir William Harcourt, speaking in 1881 of the doctrine that he, as Home Secretary, was constitutionally responsible for the government of Ireland, says 'In one sense that is true, in another sense it is not perfectly accurate. The Right Hon. Gentleman knows perfectly well that the Home Secretary is the only medium of communication between the Sovereign and the Lord Lieutenant, and he also knows that the details of Irish administration do not pass through the Home Office. Therefore, I do not think that the noble Lord can seriously suppose that I am the proper source of information with regard to the details of the administration of the Executive of Ireland.' *Hansard*, cclxii. 22.

in Irish policy and so be required in the Cabinet, or Irish business may need to be conducted in the House of Commons by a Chief Secretary who can speak with the weight attaching to Cabinet office.

The Chief Secretary in such cases helps in the Cabinet to settle the policy which shall be pursued in Ireland, and is practically responsible for the government of the country, though formal communications may be necessary from the Home Office to the Lord Lieutenant and formal acts done by the Lord Lieutenant in Council. For most purposes the Chief Secretary is to Ireland what the Home Office and the Local Government Board are to England.

Ireland has not only a representative of royalty and a Privy Council of its own, it also has a Chancellor, law officers, and a complete duplication of Courts. Of these it is not necessary to speak here.

§ 8. *The Scotch Office.*

Scotch
business

Until 1885 the connexion of Scotland with the central government was maintained chiefly through the Home Office, but the labours of that heavily burdened department were relieved in this respect by the assistance rendered to it by the Lord Advocate. The Lord Advocate is the first law officer of the Crown in Scotland, corresponding to the Attorney-General in England, and he added to his duties as a law officer those of a Parliamentary Under Secretary to the Home Office for Scotch business.

In 1885 a Secretary for Scotland was created¹. In his office was concentrated the business relating to Scotland which had before been transacted in various departments.

trans-
ferred
from
Home
Office and
elsewhere
to Scotch
Office.

The powers and duties of the Home Secretary under 45 Acts 'and any Acts amending the said Acts,' the powers and duties of the Privy Council as regards manufactures and public health, certain business heretofore transacted at the Treasury and the Local Government Board, and the administration of the Scotch Education Act were assigned to this

¹ 48 & 49 Vict. c. 61.

new Secretary, whose position, as regards education, is that of Vice-President of the Committee of Council on Education in Scotland. Though he keeps the Great Seal of Scotland he is not a Secretary of State, but a representative, for local purposes, of various departments of government. He is appointed by warrant under the royal sign manual.

§ 9. *The Law Officers of the Crown.*

The King cannot appear in his own courts in person to plead his cause where his interests are concerned. So from very early times he has used the service of an Attorney or agent, to appear on his behalf. The list of Attorneys-General begins early in the reign of Edward I. The Solicitor-General, whose title and date of appearance suggest that he represented the King in matters arising in Chancery, appears first in the reign of Edward IV.

These law officers are not only the legal advisers and representatives of the Sovereign; they are at the service of the State where offences against the good order of the community are dealt with, not by a private prosecution but by the government of the day.

The government may call for their advice and so may each department of government; they are expected to defend in the House of Commons the legality of ministerial action if called in question. As Councillors of the Crown they receive a writ of attendance, together with the Judges, to the House of Lords at the commencement of every Parliament¹.

The Crown, or it is more true to say the Government, has its legal advisers for Scotland and for Ireland: the Lord Advocate and Solicitor-General for Scotland, the Attorney- and Solicitor-General for Ireland.

¹ These writs mark the position of the Attorney- and Solicitor-General as members of that outer Council, the *Concilium Ordinarium* as opposed to the *Concilium Privatum*, which was so noticeable in the sixteenth century. The summons is a form, but, like other constitutional forms, throws light on the character of the office to which it is attached. It may explain the fact that the English law officers, unlike the Lord Advocate and the Irish law officers, are not Privy Councillors.

The law officers of the Crown play a various part. They are the legal advisers of the Crown, the Ministry, and the departments of government; they are members of the Ministry, though never of the Cabinet, and come and go with the change of party majorities; they are members of the House of Commons, and responsible to Parliament for the advice given to the Crown and its servants; they are the chiefs of the legal profession in their respective countries, and represent the Bar when the Bar takes collective action.

Subordinate political offices.

Most of the Parliamentary heads of departments have the help of a Parliamentary subordinate. The First Lord of the Treasury, or whoever leads the House of Commons, is aided by the Patronage Secretary and the Junior Lords of the Treasury. The Secretary to the Treasury assists the Chancellor of the Exchequer; the Secretaries of State, the First Lord of the Admiralty, and the President of the Board of Trade have each a Parliamentary Secretary. In the War department there is also a Financial Secretary, and in the Admiralty a Civil Lord: sometimes, too, a Naval Lord has a seat in Parliament.

The Vice-President of the Committee on Education, the First Commissioner of Works, the Postmaster-General, the President of the Board of Agriculture, the Irish and Scotch Secretaries are the sole Parliamentary representatives of their departments¹. The Lord President, Lord Privy Seal, and Chancellor of the Duchy need no Parliamentary assistance.

The Parliamentary Secretaries are not considered as holding office under the Crown. They do not kiss hands or go through any other formality on their appointment, nor does the acceptance of such office vacate their seats².

Cabinet offices.

The offices which necessarily bring their holders into the

¹ This statement needs to be qualified to this extent, that the Lord President of the Council would represent the Education Office and the Lord Lieutenant of Ireland the Irish Office upon occasion in the House of Lords, and the position of the Irish Secretary in relation to the Lord Lieutenant has varied from time to time; but my statement is substantially true.

² Vol. i. Parliament, ch. v. sect. i. § 6.

Cabinet are not more than ten in number. The First Lord of the Treasury, the Lord Chancellor, the Lord President, the five Secretaries of State, the Chancellor of the Exchequer, and the First Lord of the Admiralty must be members of every Cabinet, though the Chancellor of the Exchequer was not considered essential to a Cabinet at the beginning of this century, nor the First Lord of the Admiralty at the beginning of the last¹. The President of the Board of Trade and the Lord Privy Seal have been members of the Cabinet during the last four administrations. The Lord Lieutenant of Ireland, or Chief Secretary, one or other, is always a Cabinet Minister. The Presidents of the Local Government Board and of the Board of Agriculture, the Chancellors of Ireland and of the Duchy of Lancaster, the Secretary for Scotland and the Postmaster-General may or may not be in the Cabinet; this would depend on the importance of the holder of the office, or of the office itself at the time, or of the willingness of a Prime Minister to gratify his supporters in the Ministry.

But the size of Cabinets tends to increase, and it may be that the system is changing under our eyes. Mr. Gladstone's Cabinet of 1886 consisted of 14 members. In 1892 Lord Salisbury's Cabinet had grown to 17, and his Cabinet of 1895 has reached the number of 19. The work of deliberation cannot be facilitated or strengthened by this increase of numbers, and we may find that we are returning, in some respects, to the practice of the last century, to an inner circle, the confidential Cabinet, and an outer group of persons to whom Cabinet office is given in order to please an individual, a constituency, or an interest.

The departments of government with which I have dealt are all in immediate contact with Parliament because their official chiefs, though holding office under the Crown, are

Size of
Cabinets.

Con-
nexion of
Ministers
and Par-
liament,

¹ See Bulwer's *Life of Palmerston*, i. 91, as to the Chancellor of the Exchequer. *Hardwicke State Papers*, ii. 461, as to the First Lord of the Admiralty.

necessary
to the
depart-
ments.

excepted from the official disability imposed by the Act of 1707. So completely has opinion changed since the Act of Settlement forbade persons holding office under the Crown to sit in the House of Commons, that no one of the offices which I have described can be held for many weeks together without a seat in Parliament. This rule is based on custom created by convenience. For purposes of administration an officer of State could conduct the business of his department as well or better without a seat in Parliament. But the great departments of government are filled by the Queen from a group of statesmen indicated by the electorate, and their business must be conducted subject to the criticism of the representatives of the people. If a department is not represented in Parliament, criticism goes unheeded or the department is undefended. If comment upon bad administration is to be effective, if good administration is to be justified and supported by public opinion, it is essential that the great departments should be represented not merely in the House of Lords but in the House of Commons. This matter will be better dealt with in the next section. Here it may be noted that the most recent instance of a Cabinet Minister remaining without a seat in Parliament for any length of time is that of Mr. Gladstone in 1846. On being appointed Colonial Secretary in December, 1845, he vacated his seat for Newark, and, failing to obtain re-election, he was out of Parliament until he went out of office with Sir Robert Peel in June, 1846.

SECTION IV.

NON-POLITICAL DEPARTMENTS AND THE PERMANENT CIVIL SERVICE.

§ 1. *Non-political Departments.*

Depart-
ments
without a
political
chief.

We should bear in mind that when we have described the various departments of government as represented by their political chiefs, we have only drawn in outline the salient

features of the executive. There are important departments which are not thus represented in Parliament, and every department, whether it does or does not possess a political chief, possesses a staff of permanent officials by whom the daily business of government is carried on.

The departments which are not thus represented by a political chief are, broadly speaking, the outlying departments of the Treasury, the Ecclesiastical Commission, and the Charity Commission.

But since a department which has no authorized spokesman in either House is apt to fare badly under adverse criticism, it will be found that provision is made for some Parliamentary representation of each of these departments. The members of the Treasury Board would naturally defend or explain, if required, the action of the offices with which it is connected¹, and which have no political chiefs. Of these some discharge merely ministerial duties, as the Inland Revenue and Customs Commissions, and the Registry Office. Others discharge duties which may bring them within range of criticism, as the Commissioners of Woods and Forests, who manage the Crown lands not only for revenue purposes, but in the interest of the public generally. Such, too, is the case of the Civil Service Commissioners, whose control over the topics and conduct of the examinations by which young men are admitted into public employment might enable them to exclude the Universities from the Civil Service or the public schools from the Army.

¹ The offices are :—

The Audit Office.	Boards of Fisheries and Manufactures (Scotland).
Customs Establishment.	London Gazette Office.
Exchequer Office (Scotland).	National Gallery and National Portrait Gallery.
Inland Revenue Department.	Parliamentary Counsels' Office.
Mint.	Board of Works (Ireland).
National Debt Office.	Stationery Office.
Paymaster-General's Office.	Post Office.
Public Works Loan Board.	Office of Works.
Office of Woods.	
Civil Service Commission.	

The last two have their parliamentary chiefs.

The Ecclesiastical Commission.

The Ecclesiastical Commission.

The Ecclesiastical and Church Estates Commission is not connected with any government department. I shall have to speak of it in a later chapter, so will only say here that in respect of the management and distribution of Church property it exercises large powers conferred upon it by various Statutes. In the discharge of the duties thus laid upon the Commission it may very possibly become the subject of hostile criticism or inquiry, and this possibility is met, not by giving to the Commission a changing political chief, but by placing among its members the Bishops and certain great officers of State, and by the further introduction into its body¹ of two paid Commissioners, one of whom is eligible for a seat in the House of Commons.

The Charity Commission.

The Charity Commission.

The Charity Commission needs a longer notice. It dates from 1853; and its objects are to protect property held upon charitable trusts; to inquire into the administration of such property; to adapt the use of the charity from time to time to purposes corresponding to the intentions of the donor, where those purposes cannot profitably be carried out as originally expressed; and to cheapen and facilitate legal proceedings incidental to the use of charities.

Nature of a Charity:

A charity is for these purposes a grant of property in trust for the benefit of the public, or of some class of the public, not necessarily for the benefit of the poor. In process of time such a grant may come to be lost, wasted or misapplied. The body of trustees may fail to be renewed, and funds which stood in their joint names may pass into the hands of the survivor, and thence, if the trust be not reconstituted, may become confused with his personal property. Careless

liability to loss,

¹ 13 & 14 Vict. c. 94, s. 3.

administration of the property may lead to a diminution of its capital value, or an improvident distribution of its income. Lapse of time may alter the conditions of the grant so as to or misuse. make its application useless or even harmful.

The legal position of charities before the appointment of the Charity Commission was this:—the trustees could not deal with the capital or *corpus* of the property without the approval of the Court of Chancery, nor without such approval could they alter the distribution of the revenue. Thus, though trustees of charities enjoyed some special facilities in coming before the Court, they could not make an advantageous sale of property or a suitable change in the disposition of the income without entering upon legal proceedings which often involved expense and delay.

The better management of charities had been under the consideration of Parliament for a long time before the first Act on the subject was passed in 1853¹. The object of this Act was to place in the hands of a public body many of the powers which before could only be exercised by the Court of Chancery. It empowered the Crown to appoint by sign manual warrant four Commissioners, three to hold office during good behaviour and one during pleasure. The last was to be unpaid, and a mode was thereby provided for representing the department in the House of Commons. To this body two Commissioners were added in 1874, when the work of the Endowed Schools Commission was transferred to the Charity Commission, and two more in 1883 under the City Parochial Charities Act. Under the Act of 1853 and successive Acts which have modified or extended the powers originally conferred, the Commissioners can inquire into the administration of charities and compel the production of

¹ A Parliamentary Commission sat from 1818–1837, and reported on all the charities in the country. A select Committee of the House of Commons, appointed in 1835, examined and reported on this report: and a Royal Commission sat in 1849 to consider the completed reports of the Commission of 1818.

their powers as to management; their accounts¹. In various ways they can cheapen and facilitate the management of property held on charitable trusts. They can appoint new trustees by simple order, can advise them in matters of doubt, and can give them a statutory indemnity for acting on such advice. They can sanction and control sales, mortgages and leases of lands. They can vest property in official trustees, thus not only securing the property, but simplifying the title to it. By these means charities are saved the delay and cost of proceedings in the Chancery Division.

as to change of scheme; Again, where it is desirable to alter the mode of administering a charity because of a change in the circumstances of the place which was to be benefited, or of the property constituting the endowment, or of the general conditions of society, the Charity Commission have received power, since 1860, to frame new schemes for effecting the intention of the founder of the charity. This power, as regards charities which have an income exceeding £50 a year, is exerciseable on the application of a majority of the trustees, in the case of charities which have a less income the Commission may act on the application of a single trustee or two inhabitants of the parish within which the charity is to be administered. In the case of educational endowments under the Endowed Schools Acts the Commissioners exercise their own initiative.

its limitations. The power is further limited in its exercise by the doctrine of *cy prés*. This requires that the end contemplated by the founder should be kept in view, though the means may require

¹ The Acts relating to the Charity Commission are, as regards inquiry into administration of Charitable Trusts, 16 & 17 Vict. c. 137 (1853), 18 & 19 Vict. c. 124 (1855); as regards Schemes, 23 & 24 Vict. c. 136 (1860), 32 & 33 Vict. c. 110 (1869); as regards Endowed Schools, 32 & 33 Vict. c. 56 (1869), 36 & 37 Vict. c. 87 (1873); as regards the City Parochial Charities, 46 & 47 Vict. c. 36 (1883). The transfer to the Charity Commissioners of the powers of the Endowed Schools Commission was effected by 37 & 38 Vict. c. 87 (1874). They are also empowered by 45 & 46 Vict. c. 80 (1882) to promote and control the use of land held on trust for the poor for the purpose of allotments.

variation. A wider range of variance appears to be permitted under the Endowed Schools Acts than under the Charitable Trusts Acts, though schemes under the former must be submitted for approval to the Education Department. If the proposed scheme be regarded by trustees as too widely divergent from the objects of the founder, an appeal lies, in the case of a charity, to the Chancery Division of the High Court, in the case of an educational endowment, to the Judicial Committee of the Privy Council¹.

§ 2. *The permanent Civil Service.*

In one way or other every public office is provided, directly or indirectly, with a spokesman in Parliament, who has some special knowledge or official connection with its business, though he may not be its political chief.

This is the more important, because no one but a servant of the Crown can speak on behalf of a government department²; its officers are in the employ of the Queen; so are the great Ministers of State, who are individually responsible for their departments and collectively for the conduct of the Queen's business, and these latter are alone entitled to represent the service of the Crown in all its branches. If things go wrong it is for the Queen's advisers to suggest a change of measures to the department, or failing this, a change of men to the Crown. The Cabinet can almost³ always in the last resort ask the Queen to exercise her power of dismissal, and treat a refusal as a mark of want of confidence in themselves.

It is always possible to turn a non-political into a political department by removing the Parliamentary disability of its chief officer. Custom and convenience would then require

¹ See cases in *re Campden Charities*, 18 Ch. D. 310. *St. Leonard, Shore-ditch, Parochial Schools*, 10 App. Ca. (P. C.) 304.

² Mr. Todd (*Parl. Gov. in England*, i. 752) states that the votes in supply for the British Museum are an exception to this rule, being proposed by one of the trustees. This seems to have been the practice at least as late as 1866. When it was altered I do not know, but the vote appears now to be moved by the Parliamentary Secretary to the Treasury.

³ See post, p. 214, as to offices tenable 'during good behaviour.'

that he should have a seat in Parliament, and direct responsibility to Parliament would at once give him the control over the policy of his office.

Political
chief and
perma-
nent staff.

The Parliamentary chief for the time being personifies the department in the view of the public ; but the business of the country is done by the permanent officials. They are severed from political life not merely by the Statutes which disable them from sitting in the House of Commons, but by the usage of the Civil Service, applicable to both Houses of Parliament, which secures 'that the members of the service remain free to serve the government of the day without necessarily exposing themselves to public charges of inconsistency or insincerity¹.' The Parliamentary chief changes, but they are unaffected by the ebb and flow of political opinion. To this circumstance we owe several advantages.

Advantages of
permanence in
securing
better
men

Security of tenure and the reasonable prospect of promotion induce men of distinguished ability to enter the public service. They take an interest in their work which they would not feel if they knew that their official careers might be brought to an end by matters over which they have no control—an adverse division in the House of Commons, or the blunders of another department, leading to the retirement of the Ministry. Thus the country is well served, and it is well served on more economical terms than would be possible if the tenure of office were precarious.

and
better
work.

And one may say further, that but for this rule of permanence the Civil Service would not merely fall short of its present standard of excellence ; it would not attain to an ordinary standard of efficiency. If we picture to ourselves a new staff of officials on each change of Ministry beginning afresh to master the elaborate system of Treasury control or the multitudinous detail of the Home Office, we can form some idea of the difficulties which would befall us if the

¹ Order in Council, 29th Nov. 1884, whereby a civil servant standing for a constituency must resign his post when he announces himself as a candidate.

entire patronage of the Crown was placed at the disposal of an incoming Prime Minister. When we further recollect that in 1885 and 1886 four Ministries held office, that, in the case of two of these, one lasted for 227 days, and the other for 178, it is plain that a system which is said to lead to departmental inefficiency in America, where there is necessarily a four years' tenure of office, would lead, with us, to departmental collapse.

It is in the permanent character of our Civil Service that we find not only the security for its efficiency, but the opportunity of obtaining the highest class of ability at a comparatively low rate of emolument. It remains to ask how is the administration of the department affected by the frequent change of its Parliamentary chief.

Mr. Bagehot has dwelt at length on the advantages of the system. Official work, however capable and zealous the public servant may be, is apt to get into grooves. The Parliamentary chief brings a fresh mind to bear on the routine of office, and may ensure a circulation of ideas in its intellectual life.

Perhaps Mr. Bagehot's ideal is not always attained. He pictures the political leader bringing intelligent curiosity and quickening impulse to bear on the work of his department, while a permanent staff with a precise knowledge of the action of the official machinery is prepared to welcome with zeal his suggestions for making it move quicker, more smoothly, more cheaply¹. This may not always be so. Perhaps some heads of departments are too ready to assume that everything is right; and others, that everything is wrong. Some are willing to accept, without question, the traditions of the office, others are ready to pull to pieces, at once, a machine the working of which they have not had time to understand.

But whether or no the Parliamentary chief promotes the administrative capacity of his department he is certain to render it one great service. He stands between it and the House of Commons.

Advantage of a party chief.

Mr. Bagehot's ideal:

he defends it from attack;

¹ Bagehot, English Constitution, ch. vi. 'Change of Ministry.'

It is possible that the permanent staff know too much to be tolerant of criticism: they may meet it with resentment and contempt. It is certain that a popular assembly knows too little to criticise with effect. Its criticism may be perverse, its interest intermittent, its action capricious.

It is the duty of the Parliamentary chief to aid his department by answering criticism which needs to be answered, by resisting expressions of censure, or legislative action, which is ill considered or unjust. He can speak with some experience of the ways of the House of Commons, and with some sympathy for its ignorance, for he has but lately learned the business of the department himself: if his powers of persuasion fail, he has the government majority at his back.

he represents it in public.

And not only in dealings with the House of Commons is the Parliamentary chief of use to his department. He is to the general public the interpreter of official life; he represents his office in the view of the country. If he gets credit for its successes he also suffers for its shortcomings or failures.

It might be possible to have as good a public service if the departments were not represented in Parliament, but it is certain that we should not have so strong a public service, and that its place in popular esteem is raised, even at the cost of some want of appreciation of the merits of the permanent staff, by its connection with party politics.

Liability to a proscription.

It is well to bear in mind that the permanence of the civil service, though we regard it as following necessarily from the general disqualification of officials for a seat in the House of Commons, is really only a matter of convention. It is impossible to read Swift's diary or the letters of Bolingbroke without seeing that the American maxim—'the spoils to the victor'—was very present to the minds of the Tory party in the reign of Anne. Walpole and George Grenville deprived officers of their commissions for voting against the Government in Parliament. Henry Fox in 1763 dismissed opponents of the Government from non-political places on such a scale as to excite general disgust. Since then we have heard

nothing of a proscription; but it would be perfectly legal, though neither just nor politic, for an incoming minister to obtain from the Crown as a proof of confidence the dismissal of every civil servant who holds his office during pleasure.

This brings us to the nature of official tenure. On what terms do public servants hold their offices? Tenure
of public
servants :

All offices, whether limited as to tenure by a specified time or not so limited, are held subject to one of two conditions: they are held either 'at pleasure,' or 'during good behaviour,' and unless otherwise stated their occupants hold 'at pleasure.' at plea-
sure ;
Some hold directly of the Crown, and are appointed either,

(1) By delivery of symbols of office, e.g. the seals of a Secretary of State;

or (2) by Order in Council, e.g. a Civil Service Commissioner;

or (3) by letters patent under the Great Seal, e.g. the Comptroller and Auditor-General;

or (4) by warrant or commission under the sign manual, e.g. the Viceroy of India, the First Commissioner of Works, or an officer when first given permanent rank in the Army.

Some are not directly appointed by the Crown, but are appointed with more or less of form by heads of departments. An officer in the navy, for instance, holds a commission from the Lords of the Admiralty, an Under-Secretary of State is appointed without form by his political chief, the Receiver-General of Inland Revenue by treasury warrant.

But all hold on one or other condition, the royal pleasure or good behaviour. during
good be-
haviour.

To this last a third is sometimes added which has given rise to misunderstanding. The Judges, the members of the Council of India, the Comptroller and Auditor-General, hold office during good behaviour, '*but upon the address of both Houses of Parliament it may be lawful to remove them.*' This has been construed to mean that such officers can *only* be removed on address of the two Houses. But the words mean simply that if, in consequence of misbehaviour in

respect of his office, or from any other cause, an officer of state holding on this tenure has forfeited the confidence of the two Houses, he may be removed, although the Crown would not otherwise have been disposed or entitled to remove him. Such officers hold, as regards the Crown, *during good behaviour*; as regards Parliament, *at pleasure*. We may then dismiss this condition of tenure, as being part of the law relating to Parliament. Apart from this the question of dismissal is not wholly free from difficulty.

Appointments made during good behaviour create a life interest in the office, unless specifically made for a term of years. Such as are made directly by the Crown are made by sign manual warrant or by letters patent. Good behaviour means good behaviour in respect of the office held. Misbehaviour appears to mean misconduct in the performance of official duties, refusal or deliberate neglect to attend to them, or, it would seem, conviction for such an offence as would make the convicted person unfit to hold a public office¹.

Where an office is thus forfeited by breach of the condition of tenure, the mode of removal does not seem perfectly clear.

Powers of
dismissal.

The forfeiture of an office held by letters patent must, it is said², be enforced by a writ of *scire facias*, which has been thus described:—

The writ of *scire facias* to repeal or revoke grants or charters of the Crown is a prerogative judicial writ which, according to all the authorities, must be founded on a Record. These Crown grants and charters under the Great Seal are always sealed in the Petty Bag Office, which is on the Common Law side of the Court of Chancery and become Records there³.

The duties of the Petty Bag Office are now discharged in the Crown Office in Chancery⁴, but the writ of *scire facias*

¹ Coke, Rep. 9. 50. *R. v. Richardson*, 1 Burr. 539.

² 'Regularly there must be a *scire facias* to remove the party where he has the office by matter of record; for he cannot be removed without matter of record.' Com. Dig. Tit. Offices, k. 11.

³ *R. v. Hughes*, L. R. 1 P. C., p. 87.

⁴ 37 & 38 Vict. 8.81. 3. 5.

must none the less be founded on a Record, and thus would be inapplicable to the forfeiture of offices granted by sign manual warrant.

There appears to be authority¹ for saying that a sign manual warrant, making a grant of property, may be revoked simply: if so it would seem that a grant of office might on the occurrence of cause of forfeiture be revoked in like manner. Probably the warrant would, on just cause, be revoked and the ejected officer left to proceed, if so minded, against the Lords of the Treasury for his salary in the form of a Petition of right, or by writ of *quo warranto* against the person who had replaced him in his office.

There remain the cases of appointments, such as those of the Council of India, made during good behaviour, but not made by any formal document proceeding from the Crown. The power of the Secretary of State for India to dismiss a member of the Council for misbehaviour in respect of his office must be assumed. The form in which it could be questioned must remain matter for speculation.

¹ Forsyth, Cases in Constit. Law, 385.

CHAPTER V.

THE DOMINIONS AND DEPENDENCIES OF THE CROWN.

THIS chapter must cover a wide field. In official documents the Queen is described as

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, Empress of India.

But these words do not fully describe the compass of her sovereignty. In this chapter I wish to deal with the relation of the central executive to all those territories which acknowledge her rule, whether or no they fall under the title which I have just set forth.

The
United
Kingdom.

Thus I must speak of the United Kingdom and its component parts: of the general duties of the Home Office in the maintenance of order, and the communication of the Queen's pleasure; of the special duties of the Local Government Board and of the connection of local self-government with the central power.

The ad-
jacent
islands.

Next I must note the constitutions of the adjacent islands, and the mode in which, mainly through the Home Office, they are connected with the executive.

The
Colonies.

Thirdly will fall to be considered the royal prerogative in respect of the Colonies, the mode of its exercise through the Colonial Office, and the limitations imposed upon its exercise by the constitutions of the various Colonies.

Fourthly will come the India Office, its relation to the India government of India and the dependent native states.

Lastly, I must note some miscellaneous possessions of the Crown, and the relations of the Crown to protectorates, dependent states and spheres of influence, where we trench on the subject of foreign relations.

SECTION I.

THE UNITED KINGDOM.

§ 1. *England and Wales.*

And first as to the United Kingdom. England and Wales have so long been one kingdom that to consider the process of union between the two seems almost as remote a matter of inquiry as the welding together of Saxon England under pressure of Danish invasion and Norman rule. But some traces of this gradual assimilation of institutions are comparatively modern, and it may be well to note the steps by which it took place.

Edward I in 1284, by the Statutum Walliae, formally annexed Wales, alleging that Divine Providence, among other distinctions which it had conferred upon the English kingdom, had brought Wales and its inhabitants, heretofore his feudal vassals, *in proprietatis nostrae dominium, et coronae regni praedicti tanquam partem corporis ejusdem annexit et univit*. English laws and the rules of procedure of the English courts were at this time partially introduced.

In 1535 Henry VIII¹ divided Wales into twelve counties, giving to each county and to the principal town in each county the right to return a member to the House of Commons. Hitherto the principality had consisted of eight counties and a border district. The same Act provided that the rules of the English Common Law and the existing statutes of the English Parliament should be 'used and executed' in

The
Statutum
Walliae.

Legisla-
tion of
Henry
VIII.

¹ 27 Hen. VIII. c. 26. See also 34 & 35 Vict. c. 26, s. 2.

Wales. A few years later the courts of the hundred and shire were established in Wales, and in each year sessions, called the king's great sessions, were to be held in each county, by a judge exercising the same jurisdiction as the judges of the superior courts in England, independent and exclusive of the process of the courts at Westminster.

The counties were arranged for this purpose in four groups, one judge for each group¹.

Complete
union.

In 1747 it was enacted that the mention of England in an Act of Parliament should be taken to include Wales², and in 1830 the separate jurisdiction of the Welsh courts of great session was taken away, their judges abolished, and Wales brought wholly under the jurisdiction of the Westminster courts³.

§ 2. *Scotland.*

The union
of the
Crowns.

The relations of Scotland with England are settled by the Act of Union, the provisions of which have been but slightly affected by subsequent legislation. Such a union was inevitable from the time that the two kingdoms were placed in the same allegiance by the accession of James VI of Scotland to the throne. Very early in the reign of James it was held that Scotchmen born after James had become king of England were entitled to the rights and privileges of English subjects, being born in allegiance to the English king³. The Crown of Scotland followed throughout the seventeenth century the vicissitudes of the English Crown. The Scotch Parliament in 1661 declared the hereditary right of Charles II, and in 1689 followed the English Bill of rights with the Scotch claim of right, and the offer of the Scotch Crown to the King and Queen of England⁴. As the inconvenience of separate Parliaments and the risks of a divided succession made it plain

¹ 34 & 35 Hen. VIII. c. 26, modified by 18 Eliz. c. 8, and 13 Geo. III. c. 51.

² 20 Geo. II. c. 42, s. 3.

³ 11 Geo. IV and 1 Will. c. 70.

⁴ Acts of the Parliament of Scotland, ix. 38.

that union was inevitable, each Parliament tried to force the hand of the other. The Scotch in 1704 passed the Act of Security providing that, unless on the death of Anne there were heirs of her body, or a successor was appointed by her in conjunction with the Estates, then in such case the Estates should appoint a successor. The person so appointed was not to be successor to the throne of England unless meantime provision was made for the independence of Scotland and its freedom from English influence¹.

The English Parliament retorted next year by an Act which made Scotchmen aliens and prohibited the importation of Scotch cattle, coals, or linen after Christmas Day, 1705.

The union
of the
nations.

The Scotch had most to lose by holding out, and before this last Act could take effect the terms of union were so far settled that the English Parliament repealed the threatening clauses.

The United Kingdom of Great Britain was the creation of the Treaty of Union.

From 1602 until 1707 England and Scotland had been two communities in allegiance to a king who held his crown by two distinct titles, governed through two distinct executive bodies, and taxed and legislated through two distinct Parliaments. In 1707 the Act of Union was passed². Its main provisions secured that England and Scotland should be one kingdom, and the succession to the crown the same for both countries, that they should have one Parliament, and that except as otherwise agreed the rights of citizenship should be the same for all.

Terms of
union.

The representation and taxation of the two countries was settled in proportion to their respective numbers and wealth, the ecclesiastical arrangements of the two countries were carefully maintained *in statu quo*. The Scotch moreover retained their rules of private law and the constitution and procedure of their courts. The judgements of the Court of Teinds and the

As to Pri-
vate Law.

¹ Acts of the Parliament of Scotland, xi. 136. The royal assent had been refused to this Bill in 1703.

² 6 Anne, c. 11. The Acts of Ratification passed, in Scotland on the 16th of January, in England on the 6th of March.

Court of Session¹ from which appeal had lain to the Parliament of Scotland were held, though this was not expressly stated in 6 Anne, c. 11, to be subject to appeal to the House of Lords. A new Court of Exchequer was constituted in Scotland for revenue purposes by 6 Anne, c. 53; from this too error lay to the House of Lords.

Repre-
sentation.

It remains to consider the relations of Scotland since the Union to the legislative, executive, and judicial machinery of the constitution. The representation of Scotland in the Parliament of the United Kingdom is a matter which I have dealt with elsewhere². Like the rest of the United Kingdom, Scotland is not merely subject in common with the whole Empire, to the sovereignty of Parliament, but Acts of Parliament are of force in Scotland unless their operation is limited by express words or necessary implication. The attempt made in the Acts of Union with Scotland and Ireland to frame fundamental laws which no subsequent Parliament might alter is noticed elsewhere³.

The Ex-
ecutive.

The Executive Government of Scotland was for some years after the Union conducted by a Secretary of State for Scotland⁴. This office was not continuously filled, but existed, except at short intervals, until 1746. On the rearrangement of the business of the Secretariat in 1782, the Home Office took over the formal conduct of Scotch affairs, the Home Secretary being advised in these matters by the Lord Advocate, a law officer corresponding to the English Attorney-General but discharging for the purpose of the domestic business of Scotland the duties of an Under-Secretary for the Home department. In 1885 a separate department was

¹ The Court of Session is the supreme civil Court of Scotland. The Court of Teinds was a body of Commissioners, since absorbed into the Court of Session, for dealing with ecclesiastical endowment by way of tithe, readjusting its distribution in the interests of the church, making new parishes, or altering the boundaries of existing parishes.

² Vol. i. Parliament, ch. v. s. i.

³ Ibid., ch. iii.

⁴ Stanhope, ii. 69. For a list of such Secretaries see Haydn, *Book of Dignities*, 502 (ed. 2).

created for the conduct of Scotch business, and a Secretary for Scotland appointed who is not a Secretary of State nor necessarily a member of the Cabinet. Almost all the business which was before arranged in the Home Office, through the Secretary of State advised by the Lord Advocate, is now assigned to the new department.

In judicial matters Scotland retains her own law, her own courts with their procedure. The jurisdiction of the House of Lords, in appeal from the Courts of Teinds and of Session, which rested on analogy with the practice before the Union, is now based on the Appellate Jurisdiction Act, 1876.

§ 3. *Ireland.*

It is necessary to be brief in noticing the relations of England, or later of Great Britain, to Ireland before the Act of Union in 1801.

Henry II and John endeavoured, so far as their conquest and settlement of Ireland allowed, to impart the English law and judicial organization to their Irish subjects. Irish Parliaments came into existence early in the fourteenth century, summoned in the same form as English Parliaments by the deputy of the English Crown. In 1495 was passed by one of these the celebrated Statute called after the deputy of the time 'Poyning's Law'.¹ In two important points it altered the relations of Ireland to the English Crown. It brought into force in Ireland all English statutes existing at the date of its enactment. It limited the meetings of the Irish Parliament to occasions on which the King's deputy or lieutenant should certify the causes of summons under the Great Seal of Ireland and obtain licence for holding a Parliament; and it limited the legislative powers of Parliaments so summoned to the acceptance or rejection of bills already approved by the Crown in Council.

The relations of the Irish Parliament to the Crown, thus

¹ 10 Henry VII, c. 4, s. 10; see Appendix to the Irish Statutes, revised edition, p. 761.

The Irish Parliament controlled by the Crown in Council.

established by Poyning's Act, were, in the reign of Mary¹, explained to mean that the Irish Parliament might be summoned before its proposed enactments had been certified by the Lord Lieutenant and approved by the Crown in Council, and that it might then accept or reject but not amend such acts. With these limited powers it occasionally showed signs of independence, as by the rejection of a money bill in 1692, and it acquired a modified power of initiation by the practice of submitting to the Irish Privy Council the heads of Bills which it desired to see passed: these were sent or not sent to the King at the option of the Privy Council, and if returned were submitted to the Irish Parliament in the form approved by the Crown in Council, to be accepted or rejected without amendment. Thus the Parliament obtained a power of suggesting legislation similar to that of the mediaeval English Parliament, but without the power which the English Commons possessed of enforcing legislation by withholding supply.

And by the Legislative supremacy of the British Parliament.

So far the restraints upon the Irish Parliament had come from the prerogative of the Crown. In the eighteenth century the English Parliament put forward a claim to legislate for Ireland. In 1720 an Act was passed² declaring the powers of the Crown in Parliament to make laws to bind the people and kingdom of Ireland, and the same Act took away the appellate jurisdiction which the Irish House of Lords had exercised, and vested it in the English House of Lords.

The duration of Irish Parliaments, which had been limited only by royal prerogative or the demise of the Crown, was by the Octennial Act in 1768 reduced to a period of eight years, unless either of the two causes above mentioned should operate to bring about a speedier dissolution. An increased independence in the action of the Irish Parliament in respect of money bills was met on the part of the English ministers,

¹ 3 & 4 P. & M. c. 4; see Irish Statutes, Revised Ed., Appendix, p. 776.

² 6 George I, c. 5.

by sending for the adoption of the Irish Parliament a permanent Mutiny Act, and this, with many circumstances which are matter of history, contributed to hasten the demand for the independence of the Irish Parliament.

In 1782 this independence was obtained. The British Parliament repealed the Declaratory Act, thereby renouncing its right to legislate for Ireland and the right asserted for the House of Lords as a Court of error and appeal from the Irish Courts. It further addressed the Crown to remove the Executive restrictions on Irish legislation, and in compliance with this address the King gave his assent to various Irish Bills repealing the perpetual Mutiny Act, and providing that the royal veto should be the only restraint on the action of the Irish as on the British Parliament. In the following year, for the more complete assurance of the Irish in their new rights, the British Parliament passed an Act of Renunciation, by which the legislative and judicial independence of the Irish Parliament and the Irish Courts was recognised so fully and explicitly as to satisfy every demand which Ireland had made on the subject.

It is important to understand the working of the constitution under this phase of the relations between Great Britain and Ireland. The King of England was King of Ireland, and he was represented in Ireland by a Viceroy who, like the representative of the Crown in the self-governing colonies, selected the political Executive in accordance with the changes in the balance of power among parties and the shifting of the majority in the House of Commons. The Chief Secretary to the Viceroy sat in the Irish House of Commons, led the House, and introduced Government business.

But there was this marked difference between the position of Ireland in 1782-1800 and that of a self-governing Colony of the present day;—the Viceroy and Chief Secretary alike were members and practically nominees of the party in power in England. Thus it might happen that the Viceroy who was charged with the selection of ministers in Ireland,

Legislative independence granted in 1782.

Its working.

Dependence of Irish Executive on English party politics.

and the Chief Secretary who was charged with the conduct of Government business for Ireland, might be summoned away from their duties by a change in the balance of English parties. Others would take their place, probably new to the work, certainly of different political prepossessions.

And this dependence of the Viceroy and his Secretary on English party-politics did not affect merely the choice of the Executive. The royal veto on Irish Bills was a reality, not, as in England, a thing of the past. It would be exercised on the advice of the Viceroy, and one may reasonably suppose that the advice of two successive Viceroys of wholly different political views might be widely divergent on the merits of the same topic of legislation.

Possible
difficul-
ties.

Again, the enemies of the King of Great Britain would be the enemies of the King of Ireland, but the foreign policy of the King of the two countries, the declaration of war or the maintenance of peace, would certainly be determined by the advice of his British ministers. The views of his Irish Executive would reach him, if at all, through the Viceroy, himself a member of the British ministry; the views of the British ministers would carry all the weight that would be due to the comparative importance of Great Britain and Ireland; they would be communicated directly, while the opinions of the Irish executive would pass through an intermediary, perhaps unfriendly to their tenour. So the foreign policy of Ireland would be shaped by the British ministry whether the Irish would or no. But although a declaration of war by the King of the two countries might bring Ireland into hostilities with a power against whom she had no ill will, the Irish Parliament might effectively cripple the military operations of England, by refusing to vote money and men, or by requiring of its executive a policy adverse to that of its neighbour. A collision between the Irish executive responsible to the Irish Parliament, and the Viceroy and Chief Secretary responsible to the English Parliament, would under such circumstances have been inevitable.

The relations between the two countries could, in truth, only work well by the exercise of great public spirit and mutual forbearance on both sides, or by the existence of indifference or corruption on one. Fortunately for the well-being of the two countries there was no change in the English Ministry during seventeen years out of the nineteen that Ireland enjoyed this practical independence of the English Government.

The relation of Ireland to Great Britain at the time of the Act of Union presented some such difficulties as did the relation of England to Scotland at the commencement of the eighteenth century. Ireland and Great Britain were two independent countries under the same king, but the difficulties in the case of Ireland were greater than in that of Scotland, because the supreme executive in Ireland was dependent on the action of party government in England, and because differences of race and religion caused a risk of disturbance in the smaller kingdom which might necessitate the use of force by the larger kingdom.

It is enough, however, to try and exhibit the working of the two constitutions. I do not wish to pronounce on the merits or demerits of the scheme of 1782-1783, or of the policy and procedure of Pitt in bringing about the Act of Union.

The terms of this Union, embodied in Acts of the two Parliaments¹, provided that the succession to the crown should be the same, and that there should be one Parliament for the two countries. The amount of Irish representation in the Lords and Commons was determined: the subjects of the two countries were to possess equal rights as to trade, navigation, and treaties with foreign powers. The Irish laws and Irish Courts were unaffected by the change, except that from the Irish Courts an appeal lay henceforth to the House of Lords of the United Kingdom.

¹ 39 & 40 Geo. III, c. 67, and Irish Statutes, Revised Ed., 40 Geo. III, c. 38.

Legisla-
tive.

The relations of Ireland to the Parliament of the United Kingdom as regards representation have been elsewhere described¹, as regards subordination it may be said that Ireland is bound by a public statute unless expressly or by natural implication excepted.

Executive.

Its relations to the executive are neither so simple nor so satisfactory. The Queen is represented in Ireland by a Viceroy or Lord Lieutenant, and he is the chief of the executive, but the pleasure of the Crown in the various departments of government is signified to him through the Secretary of State for the Home Department (p. 199).

The Lord Lieutenant represents the Crown, but the Chief Secretary is the minister mainly responsible to Parliament for the conduct of Irish administration. This office is one of increasing importance, since the holder is in everything but name and rank a Secretary of State for Ireland. The Lord Lieutenant has large prerogatives², but as their exercise has to be explained and justified to the House of Commons by the Chief Secretary, real power tends to pass to the man who is really responsible, and the office of Lord Lieutenant, with its costly and dignified surroundings, becomes more and more a survival of a time when Ireland was not as near to us in point of communication, nor as closely connected in point of constitution as it is at the present day.

The Irish Courts are constituted on the model of the English Courts, and administer the English municipal law.

Central
govern-
ment at
home.

So far we have been concerned with the relations to one another of the different parts of the United Kingdom and the adjacent islands. Before passing to the relations of the central government with India and the Colonies, we must consider the departments which are mainly responsible for order and good government at home. They have already been

¹ Vol. i. Parliament, pp. 121, 122, 181, 210.

² The legal immunities of the Lord Lieutenant will be treated more conveniently in connection with the legal rights and liabilities of colonial governors. Section iii. § 4 of this chapter.

touched upon, and it must be plain that while there are several departments which are concerned with special topics of state control over individual action, such as the Boards of Agriculture and of Trade, and the Education Office, there are two departments which have wider functions in respect of home government, the one general, the other local. These are the Home Office, and the Local Government Board.

The Home Secretary may be said to be mainly responsible for the communication of the Queen's pleasure in matters arising within the United Kingdom and the adjacent islands, and for the maintenance of internal peace, order, and well-being, within those limits.

The Local Government Board is mainly responsible for the grant and control of powers of self-government in various matters concerning health, convenience, and the administration of relief to the poor.

§ 4. *The Home Office.*

When, in 1782, the old division of duties among the Secretaries of State was discontinued, and the Colonial Secretaryship was abolished, much of the work of the Southern department and all the work of the colonies was transferred to the Home Office. Between 1782 and 1794 the Home Secretary transacted all the business of a Secretary of State which was not concerned with our foreign relations, and this business included, besides the superintendence of our colonies, all communications between the Home Government and the Irish—and these between 1782 and the Union were frequent and important—all communications with the War Departments relating to the movements of troops at home and abroad.

In 1794 the Home Office was relieved of much business connected with the War Departments, and of colonial business in 1801; the Act of Union with Ireland brought the Chief Secretary to the Lord Lieutenant into closer communication with the Cabinet, and through his office in London is trans-

The Home Secretary: his history;

acted all Irish business, except some matters of a formal character which still pass through the Home Office.

It would seem as though a department which had been relieved of so much work must now be lightly burdened; such was the impression of the Whig economists when the close of the Napoleonic wars reduced the work of the War Department, when the Act of Union had lightened the labours of the Home Office, and when our colonies were still few and small¹.

his duties. But though the Home Office may not have been an exacting department in 1816, the State has been very active in the last eighty years, and much of this activity has been exercised at the expense of the Home Office. The statutes which throw duties on the Home Secretary in respect of the order, health, and general well-being of the community would, if I were to set them forth, appal the reader as much as Glanvil was appalled by the *confusa multitudo* of the customary rules of law in the twelfth century.

He is the
Secretary
of State
*par excel-
lence.*

In addition to these, the Home Secretary has customary duties as being in an especial manner Her Majesty's principal Secretary of State, and these duties have a certain historical interest.

Division of
business.

The business of the Home Office is, for the purposes of the department, arranged in three divisions, each superintended by a principal clerk; these divisions are respectively called the Criminal, the Domestic, and the Industrial and Parliamentary. The last two admit of being grouped together², but I think that the convenience of the reader may be better suited by a different arrangement. So I will divide the duties of the Secretary of State as follows:—

(a) Communications passing between Crown and subject; or, one may say, the expression of the Queen's pleasure.

¹ Hansard, 1st series, vol. xxxiii. p. 893, debate on Mr. Tierney's motion respecting the offices of secretaries of state, April 3, 1816.

² Practically they are so grouped. There are now (January, 1896) two permanent assistant under-secretaries, one of whom superintends the criminal, the other the miscellaneous, business of the Office.

(b) Enforcement of public order, or, one may say, the maintenance of the Queen's peace.

(c) Enforcement of rules made for the internal well-being of the community.

(a) *Communications between Crown and Subject.*

Whenever the Queen's pleasure has to be taken, or communicated to an individual or a department, unless the matter is specially appropriate to Foreign, Colonial, Military or Indian affairs, the Home Secretary is the proper medium of communication. Although each of the Secretaries is capable in law of discharging any one of the functions of the other, yet the Home Secretary is the first in precedence and his duties bring him into a more immediate and personal relation to the Crown than do those of his colleagues. He is the successor and representative of the King's Secretary as that officer appears to us in the sixteenth century, the Minister through whom the King was addressed, who kept the signet and the seal used for the King's private letters, and authenticated the sign manual by his signature. Therefore the Home Secretary has, besides the general duties of his department, much to do that is formal and ceremonial in its character. He notifies to certain great local officials¹ certain matters of State intelligence, such as declarations of war, treaties of peace, births and deaths in the royal family. When the Queen takes part in a ceremonial he ascertains her pleasure as to the arrangements, he is responsible for their conduct, and must be present.

Communi-
cation of
State In-
telligence.

Arrange-
ment
of Cere-
monial.

He receives addresses and petitions which are addressed to the Queen in person, as distinct from the Queen in Council, he arranges for their reception, their answer, or their reference by the Queen's command to the department to which they relate; but whether it be a private individual that addresses

¹ The Lord Mayor of London, the Lord Lieutenant of Ireland, the Lieutenant-Governors of Guernsey, Jersey, and the Isle of Man, the Lord President of the Court of Session, the Lord Justice Clerk, the Lord Advocate for Scotland.

Counter-
signature
of sign
manual.

the Sovereign, or a great corporation such as the City of London, or the University of Oxford, or whether it be one or both of the Houses of Parliament, the matter passes through the hands of the Home Secretary. Besides these miscellaneous duties, in the great majority of cases in which the Queen's pleasure has to be expressed formally under the sign manual, it is the duty of the Home Secretary to cause the document to be prepared for the royal signature, and afterwards to countersign it. Such documents are sometimes complete, for the purpose which they have to serve, when the royal signature has been affixed and countersigned; in other cases they only authorize the preparation of documents which must pass under the Great Seal.

Illustra-
tions.

Where a sign manual warrant is an authority for affixing the Great Seal, it must be countersigned either by the Chancellor, one of the Secretaries of State, or two Lords Commissioners of the Treasury, and this duty of countersignature falls most often upon the Home Secretary. Thus in the creation of a Peer the Prime Minister informs the Home Secretary of the intention of the Crown; a warrant for the sign manual is prepared and submitted by the Home Secretary to the Queen, and having been countersigned by him is returned to the Crown Office as authority for the preparation of the letters patent by which the Peerage is conferred, and the affixing to them of the Great Seal. These are then sent through the Home Office to the newly-created Peer.

Reasons
for his
miscel-
laneous
duties.

I have in an earlier chapter adverted to the distinction between documents which have to pass under the Great Seal, and those which are completed by the sign manual countersigned by a Secretary of State. It is enough here to note the vast amount of work of this nature, some purely ministerial, some discretionary in its character, which passes through the Home Office. And further, it should be borne in mind that there is a reason for casting all this work upon the Home Secretary. The reason is that the Queen's authority is required for a great number of warrants, and letters

patent, making appointments, conferring honours, issuing orders, or granting licences and dispensations, that the proper channel through which this authority is communicated is one of Her Majesty's Principal Secretaries of State, and that since the greater number of these matters are not appropriate to the other departments of the Secretariat,—Foreign or Colonial, Indian or Military,—the Secretary of State for the Home Department is the obvious inheritor of the ancient duties of the King's Secretary¹.

For this reason the Home Secretary, among his miscellaneous duties, is the means of communication between the Queen and the Church², for the purpose of making appointments to benefices vested in the Crown, for setting in motion the Houses of Convocation and confining their legislative action within certain limits; in matters of administration he advises the Queen, and communicates her pleasure to the Lieutenant-Governors of the Channel Islands and the Isle of Man.

Duty of Home Secretary in Church matters.

As to the adjacent Islands.

In the peculiar form of action by which the subject may sue the Crown, or, what is the same thing, a department of government, the right to sue is technically dependent on the Queen's grace. The cause of action is stated in a petition which is lodged with the Home Secretary, who takes the opinion of the Attorney-General, and consults any department of State that may be affected by the claim. If the opinion of the Attorney-General is favourable, the petition is submitted for royal endorsement of the fiat 'let right be done;' the petition is then sent to the department concerned, that a plea or answer may be returned in twenty-eight

As to petitions of Right.

¹ The form in which the Secretary of State addresses the Sovereign in communicating these matters runs thus :—

Mr. Secretary — presents his humble duty to your Majesty, and in transmitting the accompanying documents for your Majesty's signature humbly begs leave to explain, &c.

² If the Home Secretary should not be a member of the Church of England these duties are discharged by the First Lord of the Treasury. See speech of Mr. Secretary Matthews. Hansard, cccxix. p. 1734.

days, and the subsequent proceedings follow the course of an ordinary civil action.

(b) *The maintenance of the Queen's peace.*

The Home Secretary is responsible for peace and good order throughout the land, and this responsibility is discharged in various ways :—

(1) He exercises a control over the elements of possible disorder.

(2) He supervises, more or less closely, the police force of counties and towns.

(3) He has to do with the machinery for the administration of criminal justice.

(4) He controls prisons and other places for the detention of convicted persons, or of unconvicted persons charged with crime.

(5) If justice demands that a sentence should be annulled or commuted he advises the Queen in the exercise of the prerogative of mercy.

He admits
to citizen-
ship.

(1) The naturalization of aliens may seem but remotely connected with the duties of the Home Secretary in the maintenance of the peace, but the Naturalization Act¹ gives to him an absolute discretion, and he may, 'with or without assigning any reason, give or withhold a certificate as he thinks most conducive to the public good.' He is therefore entrusted with the power of determining whether or no a candidate for citizenship is likely to prove a good citizen.

He is further charged with ensuring the observance of the Foreign Enlistment Act², and of the Act³ which confers privileges upon foreign ambassadors and their servants: he thus preserves the amicable relations of the subjects of the Queen with those of foreign powers.

His con-
trol of
secret

The Home Secretary, with the other Secretaries of State and the First Lord of the Admiralty, is entitled to demand

¹ 33 & 34 Vict. c. 14.

² 33 & 34 Vict. c. 90.

³ 7 Anne, c. 12, s. 6.

a portion of the sum available (£10,000) for secret service ^{service money.} within the kingdom; he may detain and open letters in the Post Office¹, a power which is extended to telegrams², and ^{Post Office.} sometimes though not frequently used³; and may for State ^{Telegraph.} purposes control the use of the Telegraph⁴; he may obtain, without showing cause, the issue of a writ *ne exeat regno* to keep a subject within the realm; in cases of anticipated disorder he may approve or enforce provisions for the appointment of special constables⁵, and can call in the aid of the Admiralty and War Office when necessary for the maintenance of the peace.

Again, though the Secretary of State is not as such a magistrate *ex officio*⁶, nor has a general power of commitment, it seems settled that he may commit persons charged ^{His right to commit.} with treason or offences against the State, in virtue of an authority transferred or delegated by the Crown⁷. Akin to this direct interposition of the Home Secretary for the maintenance of order, may be reckoned his duties in respect of the extradition of persons who have committed crimes in foreign countries and have taken refuge upon our shores.

The Extradition Acts of 1870 and 1873⁸ lay down rules for ^{Procedure in cases of extradition.} the surrender of fugitive criminals, which the Queen may make applicable by Order in Council to any foreign state with which an arrangement to that effect has been made. The process may be described as follows: the diplomatic representative of the country within whose jurisdiction the

¹ 7 Will. IV & 1 Vict. c. 36, and see May, Const. Hist. iii. p. 48, and Torrens, Life and Times of Sir James Graham, vol. ii. c. 6.

² 32 & 33 Vict. c. 73, s. 29.

³ See debate in March, 1882. Hansard, cclxvii. 294.

⁴ 26 & 27 Vict. c. 112.

⁵ 1 & 2 Will. IV, c. 41, s. 2.

⁶ As a Privy Councillor he would be in the Commission of the Peace.

⁷ The cases bearing on this point are *Entick v. Carrington*, 19 St. Tr. 1030, *R. v. Despard*, 7 T. R. 736, *Harrison v. Bush*, 5 E. & B. 353. The authorities are not clear or conclusive, but since all Privy Councillors are placed in the Commission of the Peace for every county we need not trouble ourselves to reconcile the *dicta* and decisions of Lords Camden, Kenyon, and Campbell.

⁸ 33 & 34 Vict. c. 52. 36 & 37 Vict. c. 60.

Limited
to non-
political
offences.

crime has been committed makes application to the Secretary of State, who thereupon decides whether the crime is of a political character. Should this be the case he is bound to make no order in the matter. If, however, the crime is non-political and is one of those included in the treaty arrangement between the countries, the Secretary of State sends an order to a police magistrate or justice of the peace for the issue of a warrant for the apprehension of the alleged criminal. Either of these last-mentioned officials may issue such a warrant, but must give notice thereof to the Secretary of State, who can, if he think fit, cancel the warrant and discharge the person apprehended. At the end of fifteen days at the least the Secretary of State may make an order under his hand and seal for the surrender of the criminal to a person duly authorized by the foreign State.

But the alleged criminal may not be surrendered for a political offence, nor be tried for any other crime than that for which he is surrendered, nor for fifteen days at least after his apprehension, nor, if he is charged with any offence committed within the jurisdiction of the English Courts, until he has been tried and acquitted or has undergone sentence.

Fugitive
offenders.

Territorial
waters.

Foreign
jurisdiction.

Analogous responsibilities and powers, free from some of the restrictions just mentioned, are possessed by the Secretary of State under the Fugitive Offenders Act¹ (1881), in respect of persons accused of offences in one part of the Queen's dominions and found in another part. He is further required to consent to proceedings against a foreigner under the Territorial Waters Jurisdiction Act², and to explain if called upon to do so by any court within British dominions, the nature of a jurisdiction claimed under the Foreign Jurisdiction Act³. Such, and so miscellaneous are the duties of the Home Secretary in respect of the maintenance of the peace.

(2) For ordinary purposes we look to the police to keep order. A police force is a local force and is, in England, with one

¹ 44 & 45 Vict. c. 69.

² 41 & 42 Vict. c. 73.

³ 53 & 54 Vict. c. 37, s. 4.

exception, under the general control of a local authority. Police : The exception is the Metropolitan Police Force in the administrative County of London. But in all cases the Home Secretary exercises some supervision or control.

In counties his sanction is necessary to the appointment of in a Chief Constable, to any change in the numbers and pay of ^{counties,} the force, and to the validity of the rules made for its government. He appoints inspectors on whose report as to the efficiency of the force depends the subvention which is paid towards its maintenance from the Exchequer.

In boroughs, which have their own police, the Home Secretary in merely receives reports from these inspectors in order that he ^{boroughs,} may be satisfied as to the payment of this subvention. In the City of London the Commissioner of the City Police is in London appointed by the Mayor and Aldermen subject to his approval, ^{City,} and he sanctions the regulations made for the force.

But the Metropolitan Police have been under the immediate in London control of the Secretary of State ever since they were ^{County.} established in 1829 in substitution for the old local system of watchmen. The Metropolis for this purpose means a radius of fifteen miles from Charing Cross, excepting of course the City, and within this district the Home Secretary is especially responsible for the maintenance of order. He advises the Crown as to the appointment of the Commissioner, Assistant-Commissioners and Finance-officer of the police : the rules for the government of the force, the pay and superannuation allowances of its members, the sites and construction of its buildings, are all determined by him or subject to his approval.

The Commissioner has the practical and immediate control of the force, but in various details as to traffic in streets and licensing of refreshment houses and cabs, his action must be sanctioned by the Home Secretary, who is responsible to Parliament for the efficiency and good conduct of the force.

(3) As regards the machinery for the administration of justice, he advises the Crown as to the frequency with which assizes

The Home Secretary and the Courts. should be held, and how, on the occasions when assizes are not held in each county, the most convenient arrangements may be made for the trial of prisoners.

Where a borough has not only a separate Commission of the Peace, but also a separate Court of Quarter Sessions, a judge of such a Court is appointed by the Crown on the advice of the Home Secretary. This judge is styled the Recorder; an increase to the Recorder's salary, the number of sittings (beyond four times a year), the appointment of a deputy, are all matters within his discretion¹.

He exercises powers of a very similar character as to the assistant judge of the London Sessions and the stipendiary magistrate of a borough; the appointments of the police magistrates in the Metropolis and the regulation of the business of their courts, are entirely in his hands: he also settles the fees to be taken by Clerks of the Peace and Clerks to the Justices², and fixes the salary to be paid to the Clerk of the Peace in lieu of fees: he also fixes the table of fees to be paid to prosecutors and witnesses, and appoints the Public Prosecutor and his staff³.

(4) The duties of the Home Office in respect of Prisons are connected with a long history of prison management and discipline which cannot be dealt with here. The institutions to be considered are of four kinds:--

(a) The prisons which are used for the detention of unconvicted as well as for the punishment of convicted persons.

As regards the former, the process by which the powers of the Home Secretary have reached their present dimensions may be described as, first, inspection; next, regulation; lastly, complete responsibility and control. The three stages are illustrated by the Acts of 1835, 1865 and 1877.

By the last of these, 39 & 40 Vict. c. 21, s. 5, the prisons, their furniture and effects, the appointment and control of all

¹ 45 & 46 Vict. c. 50, Part viii.

² 14 & 15 Vict. c. 55. 40 & 41 Vict. c. 43.

³ 42 & 43 Vict. c. 22.

officers, the control and custody of the prisoners, all powers and jurisdiction vested in prison authorities or justices in session, at common law, by Statute or by charter, are transferred to and vested in the Secretary of State.

It only remains to note as a part of the subject of prisons and the punishment of crime, the duty cast upon the Secretary of State to make rules as to the execution of a capital sentence within prison walls, and to receive a certificate from the sheriff charged with the execution, in each case, that these rules are observed ¹.

(b) Convict prisons to which persons sentenced to long terms of imprisonment are consigned.

In respect of these prisons the Secretary of State always enjoyed a special control over their officers, and over the mode of confinement of persons under sentence of penal servitude, the form of punishment substituted in 1857 for transportation ². Convict prisons.

Licences to be at large on condition of good behaviour are granted by the Crown through the Home Secretary ³, and the revocation of such a licence is signified by him to a police magistrate of the Metropolis, who is thereupon required to issue a warrant for the apprehension of the convict, which may be executed anywhere in the United Kingdom and Channel Islands.

(c) Asylums for the reception of criminal lunatics.

The Home Secretary has large powers over persons who are either found to be insane on arraignment, or tried and found by the jury to be guilty of the act charged but insane at the time, or who go mad in prison; he may direct the place of confinement, he has a discretion as to the time of discharge, and he appoints a council for the supervision of the State Asylum for criminal lunatics at Broadmoor ⁴. Criminal lunatics.

(d) Reformatories and industrial schools for the correction of juvenile offenders.

Reformatories ⁵ are for offenders under sixteen years of age Youthful offenders.

¹ 31 & 32 Vict. c. 24.

² 16 & 17 Vict. c. 99. 20 & 21 Vict. c. 3.

³ 27 & 28 Vict. c. 47, s. 3.

⁴ 23 & 24 Vict. c. 75. 47 & 48 Vict. c. 64.

⁵ 29 & 30 Vict. c. 117. 35 & 36 Vict. c. 21, Part i.

Reformato- convicted of an offence punishable with penal servitude or
ries. imprisonment, and sentenced to detention in a reformatory, with or without a previous term of imprisonment¹.

Industrial Industrial schools² are for children over five years of age
Schools. neglected by their parents, or not under proper control, vagrant, or associating with criminals.

The Home Secretary in respect of both these institutions appoints inspectors, certifies as to fitness, approves of rules and changes in building, has power of discharging or removing their inmates, and in other minor matters controls their action.

The prerogative of mercy. (5) There remains in this department of his functions the duty of advising the Crown in its exercise of the prerogative of mercy. This prerogative is nothing more than an exercise of a discretion on the part of the Crown to dispense with or to modify punishments which common law or Statute would require to be inflicted. It is a dispensing power exercisable under strict limitations, and these limitations may be described as threefold³. Firstly, the power to pardon must be exercised

A dispensing power. in the case of offences of a public character. It is not limited to cases in which the Crown is the prosecutor, for it extends to persons found guilty and sentenced by the House of Lords

Its extent and limits: after impeachment by the House of Commons, but it must be so used as not to affect private rights. It cannot prevent the bringing of an action, or hinder a suit for a penalty recoverable by the individual suing, after such a suit is begun; nor can a recognizance to keep the peace towards an individual be discharged by pardon.

nor anticipate offences. Secondly, it must not be anticipatory. The middle ages furnish us with instances of charters of pardon for offences not yet committed, which were in fact licences to commit crime; and the Act of Settlement points to the same danger where it enacts that a pardon may not be pleaded in bar of an impeachment. The meaning of this provision is that

¹ 1. 56 & 57 Vict. c. 43.

² 29 & 30 Vict. c. 118. 35 & 36 Vict. c. 21, Part ii.

³ See Chitty, Prerogative of the Crown, pp. 88-102.

a Minister who executes a royal command with an indemnity from the Crown against any legal risk which may follow upon obedience, may not set up such pardon or indemnity as a defence to an impeachment by the House of Commons.

Thirdly, it must not do more than grant an immunity. In the case of an office corruptly acquired it may relieve from penalty but not from the liability to vacate office.

Thus the prerogative is a discretionary power to remit or modify punishment for a public offence actually committed, a power which must not be exercised so as to infringe private rights or secure the offender in the proceeds of his wrongdoing.

The form of its exercise is by reprieve, commutation or Form. pardon. In every case a royal warrant is necessary for the remission of the sentence, but the grant of a pardon is attended with greater formality. A pardon was formerly incomplete unless it were under the Great Seal, but since 1827 a sign manual warrant countersigned by the Secretary of State is enough¹, and takes effect at once if it be a free pardon, or, if it be conditional, on the performance of the condition².

(c) *The internal well-being of the country.*

It is under this head that the miscellaneous character of the duties of the Home Office is most apparent. Some of these have been taken away by the creation of a Scotch Secretary, of a Board of Agriculture, and by the increased powers of the Local Government Board. But even thus I will not attempt to do more than classify roughly the duties without referring to the network of Statutes by which they are imposed. Some concern the general health of the community, whether in respect of studies purporting to increase knowledge of the laws of health, as in the Acts regulating schools of anatomy, or the Vivisection Act; or in respect of

Miscellaneous
regulative
duties.

Health or
safety
generally,

¹ 7 & 8 Geo. IV, c. 28, s. 13.

² A pardon removes disqualifications which would not be removed by merely serving the sentence; per Hawkins, J., *Hay v. Justices of Middlesex*, 24 Q. B. D. 561.

the wholesomeness of land or buildings, as in the case of the Acts relating to burials, to artisans' dwellings, to sewers, to nuisances, or to open spaces within the Metropolis; or in respect of persons unable to take care of themselves, as lunatics, or habitual drunkards.

or in
special
trades.

Some concern the health and safety of those engaged in particular trades, as in the case of the Acts regulating coal and metalliferous mines, the Explosives Act, the Factory Acts.

Preserva-
tion of
useful
things.

Some concern the preservation of things of use and consumption, as the Acts for the preservation of wild birds.

The Home Secretary is concerned with the Education Acts in so far as they touch the employment of children engaged in factories and mines, with merchant shipping. He is an *ex officio* member of those phantom assemblies the Boards of Trade, of Local Government, of Agriculture.

Although the creation of special departments has relieved the Home Office from some portion of its miscellaneous duties, yet the tendency of legislation is to increase the minuteness, complexity and volume of those which remain. The Factory Act of 1895 will serve to illustrate this. And if this last group of duties was wholly removed, the Home Secretary would still be the chief organ for the expression of the royal will in administration, the Minister responsible for the maintenance of the Queen's peace and for the exercise of the prerogative of mercy.

§ 5. *Local Government.*

I would limit the treatment of Local Government as far as possible to the relations of local bodies with the central authority, the Local Government Board¹: but it is necessary

¹ For obvious reasons of space and proportion I have confined what I have to say on Local Government to England. It may be enough to mention that Scotland has its Public Health Act, 30 & 31 Vict. c. 101, and Local Government Acts, 52 & 53 Vict. c. 50, and 57 & 58 Vict. c. 58. Ireland its Local Government Acts, 34 & 35 Vict. c. 109, and 35 & 36 Vict. c. 69. The working of these is supervised by Local Government Boards for Scotland and Ireland.

to ascertain the nature of these subordinate local bodies with which the Local Government Board must deal, and the subjects with which it is concerned.

It may be convenient to consider what are the topics of Local Government, then what are the units of Local Government, then their connexion with the Local Government Board.

The subjects which local bodies administer are the Poor Laws, or the rendering of relief to persons who are unable to support themselves; the laws relating to public health; the maintenance of a police force; the control exercised over houses for the sale of intoxicating liquors by means of the Licensing Laws; the provision of asylums for persons of unsound mind; the promotion of general welfare or convenience by carrying into effect the laws relating to elementary or other schools, to public paths and open spaces, to allotments, burials, highways, and some other miscellaneous matters.

The ancient division of the country into county and town is no longer exhaustive: the units of Local Government must be divided into rural and urban. And the various duties which I have mentioned are apportioned among various bodies, some very ancient, some very newly created by Parliament.

Rural Local Government.

In the Saxon scheme of Local Government we find the township or parish was at the bottom of the scale, then the hundred, lastly the shire, organized in the shiremoot or county court, wherein the business of the freeholders, judicial, civil, ecclesiastical, and military, was conducted before the three presiding officers, the sheriff, the bishop, and the ealdorman¹. But this system had long passed away. For all purposes of administration the hundred and county court had ceased to exist; the parish alone through its overseers discharged some administrative duties, the collection of rates, the preparation of lists of Parliamentary and Local Government electors, and of persons liable to serve on juries.

¹ 51 & 52 Vict. c. 41, and 56 & 57 Vict. c. 73.

The legislation of 1888 and 1894 revives in outline this ancient order of administrative bodies.

The Parish Council, the District Council, and the Administrative County, working in with the old organization of the shire for judicial and other purposes, constitute the scheme of Rural Government worked out by the Statutes of those years.

The
parish.

The parish for these purposes means a place for which a separate poor rate is or can be made, or for which a separate overseer is or can be appointed. It is in fact a separate district for the purposes of the Poor Law. Every such parish has a parish meeting consisting of all persons in the parish who are on the Parliamentary or Local Government register. This body must meet annually, or, if there is no Parish Council, twice a year, and one meeting must take place on or within seven days of March 25.

The
Parish
Meeting.

The
Parish
Council.

The persons entitled to attend the parish meeting are the electors to the Parish Council. Every rural parish with a population of 300 or more must have such a council; it may obtain one as of course on application to the County Council, if its population is 100 or more; if its population should be less than 100 the consent of the County Council is needed as well as the request of the parish. The County Council fixes the number of councillors, which may vary from five to fifteen; and the council, which holds office for a year from the 15th of April, is bound to meet four times a year.

Its business is to appoint annually a chairman and overseer of the poor; to take charge of the non-ecclesiastical property and documents belonging to the parish; to appoint trustees of non-ecclesiastical parochial charities; to hire land for allotments, either by arrangement or, with the consent of the County Council, by compulsion; to deal with some minor sanitary matters, and, with the assent of the parish meeting, to put in force the adoptive Acts¹.

¹ The Lighting and Watching Act, 1833. The Baths and Washhouses Acts, 1846-1882. The Burial Acts, 1882-1885. The Public Improvements Act, 1860. The Public Libraries Act, 1892.

Above the Parish Council comes the council of the Rural District. The Rural District is conterminous with the poor law union, or group of parishes united for the administration of the Poor Law, and provision is made in the Act of 1894 that these unions or Rural Districts should not overlap county boundaries. The District Council a. 36.

The councillors of the Rural District are elected for a term of three years, one-third going out in each year; their numbers are fixed by the County Council, and they must be men or women entitled to vote for a parish in the district, or resident in the district for twelve months previous to the election. They are chosen by the parochial electors for the parishes or wards into which the district is divided.

Until 1894 the administration of the Poor Law and of the Public Health Acts was conducted by the guardians of the poor, who were also the Rural Sanitary Authority. They consisted partly of persons elected annually in April by the parishes constituting the Union, partly of the Justices of the Peace for the county resident in the Union, who were guardians *ex officio*. is a Poor Law and Sanitary Authority.

These powers are now transferred to the District Council, in which the *ex officio* element finds no place, and together with these powers go certain others, in respect of highways, allotments, open spaces, and other matters. These powers were either conferred, by various Acts, upon the guardians of the poor, or by the Act of 1894 upon the newly-constituted District Council.

Above this Council again comes the organization of the county, and until 1888 this was to be found in certain ancient executive offices and in the Justices of the Peace for the county, sitting in General or Quarter Sessions, in Petty Sessions, or in Special Sessions. Since the Local Government Act of that year the administrative work of the county has been almost entirely transferred to the County Council. But the older organization exists for various purposes, mainly judicial, and is in some ways more intimately connected with the central executive than the Council created in 1888. We must therefore The County.

bear in mind the distinction which exists between the ancient and the modern or administrative county.

The old
County
Court.

Nor must we forget that the county is the birthplace of our representative institutions. To the County Court of the Saxons, the Normans, the Plantagenets, came the great lords and ecclesiastics of the shire, the knights and the freeholders, from each hundred twelve lawful men, from each township four men, the reeve and the parish priest. It was a representative assembly for the administration of justice, the assessment of taxation, the transaction of the business of the shire. The sheriff presided alone when the bishop had been forbidden to attend, and the ealdorman had ceased to exist.

Its
functions
left it.

But the business of the Court left it by degrees. Its functions for purposes of taxation and the discussion of matters of general interest ceased when it sent representatives of shire and town to deal with these matters in Parliament. Its judicial business was transferred to the civil and criminal courts of the King. Since the Ballot Act of 1872 the election of knights of the shire no longer takes place in the County Court, nor since the Local Government Act of 1888 does that of the Coroner. Perhaps the only thing that could happen to a man in the ancient County Court is the proclamation of his outlawry.

Adminis-
tration
passed to
the
Justices of
the Peace.

In the meantime a mass of administrative and judicial business had by degrees been cast by Statute upon the Justices of the Peace, and in the transference of administrative duties to the newly-created County Council we see a recurrence to the ancient order of things, in which those duties were discharged by a body of persons representing the various interests of the shire.

But we have first to note how much survives of the county organization prior to 1888.

County
officers.
The
Sheriff.

The great officers of the old county system remain.

The Sheriff has from the earliest times represented the central authority in the execution of the law. Thus, he is the returning officer to whom writs are sent for the return of

members for the Parliamentary divisions of the county; he summons juries, and carries into effect the judgements of the superior courts as to persons or property within the county. He is chosen out of three landowners within the county who are selected by the Chancellor of the Exchequer, the judges, and other officers of state on the morrow of St. Martin's day. The choice of one out of the selected three is made by the Queen in Council, and the Sheriff is appointed by a warrant signed by the clerk of the Council¹.

The Lord Lieutenant, an officer who came into existence in the reign of Henry VIII, took from the Sheriff in the following reign the control which the latter had exercised over the military forces of the county. Since 1871 he no longer commands the militia, the yeomanry, and the volunteers, but he recommends for first commissions, appoints deputy-lieutenants, and suggests names to the Lord Chancellor of persons suitable to be placed on the Commission of the Peace.

The office of Custos Rotulorum, the Keeper of the Records and principal Justice of the Peace, is almost always held by the Lord Lieutenant, but separate letters patent are made out for each office. A Lord Lieutenant is now appointed under powers conferred on the Crown by the Militia Act, 1882², which is recited in the patent. The Queen appoints to the more ancient office of Custos Rotulorum by her prerogative at Common Law.

The Coroner holds inquests in cases of sudden death or of treasure trove. He was formerly elected, with certain exceptions, by the freeholders of the county; he is now appointed by the County Council.

The Justice of the Peace is in the Commission of the Peace for the entire county; he acts in a judicial and also in an administrative capacity, so far as any administrative business is left to him, at Quarter Sessions; on other occasions his action is limited to the Petty Sessional division in which he resides.

His judicial duties must be postponed till we come to the

¹ 50 & 51 Vict. c. 55.

² 45 & 46 Vict. c. 49, s. 29.

subject of the Courts. The administrative duties left to him consist in the granting, at Special Sessions, licences for the sale of intoxicating drinks and for the use of public billiard rooms, and at Quarter Sessions licences for private lunatic asylums. The Justices assembled at Quarter Sessions nominate a certain number of their body to form, in conjunction with an equal number chosen by the County Council from its members, a joint standing committee.

The Joint
Standing
Com-
mittee,
and the
Police.

By this committee the number of the police force is fixed and the Chief Constable appointed, subject to the approval of the Home Office. The Chief Constable appoints and may dismiss the men and officers of the force, but he acts under the orders and with the approval of the committee. The same committee now appoints the Clerk of the Peace, whose appointment before 1888 was vested in the Lord Lieutenant.

The
County
Council,

The County Council is now the body to which the administrative duties of the Justices of the Peace have been transferred by the Local Government Act of 1888¹. This Act created the *administrative county*.

Every county in England and Wales now possesses one Council or more, according as it may constitute a single administrative county, or may be divided for purposes of administration².

There are also a considerable number of large towns (at present sixty-four) which have been constituted administrative counties, and these possess the powers of a County Council and are for most purposes separate from the county in which they are geographically situated.

its consti-
tution ;

The County Council consists of a chairman and vice-chairman, aldermen and councillors. The Local Government Board fixes the number of the councillors, and the aldermen are one-

¹ 51 & 52 Vict. c. 4.

² There are forty ancient counties of England and twelve of Wales, but of these comparatively few coincide with the administrative county. Yorkshire, Lincolnshire, Cambridgeshire, Northamptonshire, Suffolk and Sussex are divided for purposes of administration. The Isle of Wight and the Scilly Isles also have separate Councils.

third in number of the councillors. The county is by the same authority divided into electoral divisions, each returning a single councillor, and the qualification of electors is, in boroughs, that of burgesses, in counties, the occupation of a building of whatsoever value, or of land worth £10 a year.

The Council appoints various officers for county purposes. ^{and duties :} Of its powers and duties it has taken over some from the Justices of the Peace, some are newly assigned to it. I do not propose to consider them here, but only to point out that the administrative county is now taxed and governed for most local purposes by a representative body which not only exercises large powers in respect of finance, public health, roads and bridges, and other matters, but is brought into various relations with the District and Parish Councils. The District Council is the body which comes into most direct ^{its relation to District and Parish :} relation with the County Council. Some things may be done by the district with a delegated authority from the county, in some the two bodies may act jointly, in others the County Council can control or enforce action by the District Council either directly, or upon appeal from the Parish Council.

On the other hand the County Council is itself controlled ^{to central executive.} by various branches of the central executive; its by-laws are subject to disallowance by the Queen in Council: and the Local Government Board which audits its accounts, gives it permission to borrow money, and otherwise exercises a general control over its action.

Urban Local Government.

The history of the borough is a long one, and I will only ^{The Borough.} indicate some of its landmarks.

The *burh* or walled town of Saxon times became the chartered borough of the Norman kings, which bought exemption from the assessment and jurisdiction of the shire¹. From the end of the reign of Henry III such charters are not infrequent, all pointing to the same objects—the

¹ Stubbs, Const. Hist. i. 408-412.

exclusion of the Sheriff, the election by the town of its own magistrates, and the determination of its own pleas apart from the County Court¹.

Its early history.

The constitution of these towns greatly varied, but from the reign of Henry VI onwards the tendency of charters which either conferred or regulated corporate rights was to diminish the rights of the townsmen and to increase those of the magistracy. The mayor and aldermen, or the corporate governing body acquires the rights which had belonged to the freemen at large. More especially is this the case where a charter confers the right to return members to serve in Parliament.

While the King retained the power of appointing and dismissing the judges by whom the validity of these charters might be tried, the boroughs which returned members to the House of Commons were always liable to have their charters questioned, annulled, and remodelled to suit the political requirements of the King. The dealings of Charles II and James II with the borough charters are significant on this point. But in 1700 the Crown lost its control over the judges, and in 1832 the borough representation was settled by Statute. In 1835 the confused and multifarious borough constitutions were dealt with by the Municipal Corporations Act²: a model constitution was designed for corporate boroughs, and to these all existing incorporated boroughs and such as might hereafter be chartered, were made to conform. The substance of this Act and of numerous amending Acts was consolidated in the Municipal Corporations Act, 1882³.

The Municipal Corporations Acts.

The Public Health Acts.

But a town need not be a municipal borough in order to possess an organization distinct from that of the county. It may be an urban district. The Public Health Act, 1875, divided all England and Wales into sanitary districts, rural or urban, and the Urban Sanitary Authority or Local Board, which was constituted in 1875 for carrying out the provisions

¹ Stubbs, Const. Hist. ii. 217, 219.

² 5 & 6 Will. IV. c. 76.

³ 45 & 46 Vict. c. 50.



of the Public Health Act, has become the urban district of the Local Government Act of 1894.

The Municipal Corporation is constituted by royal charter, granted by the Queen with the advice of the Privy Council, on petition of the resident householders of the town. The Municipal Corporation,

The Corporation consists of the burgesses, that is the rate-payers, a mayor and aldermen. It acts through the Council, consisting of mayor, aldermen, and councillors. The burgesses elect the councillors, the councillors elect the aldermen, and the entire Council elects the mayor.

The Council so constituted may make by-laws, but these must be sent to the *Home Secretary* to be laid before the *Queen in Council*, who may within forty days disallow them: it manages the corporate property of the borough and may levy a rate when the income of this property is insufficient to meet local purposes, but a return of income and expenditure for each year must be laid before the *Local Government Board*: it may borrow on the security of the corporate property or of the borough rate, subject to the approval of the *Treasury*. Some boroughs, thus incorporated, have a Commission of the Peace separate from that of the county. Some have also a separate Court of Quarter Sessions, wherein the sole judge is a Recorder, a barrister of five years standing, appointed by the Queen on the advice of the Home Secretary. and central control.

The urban district is the creature not of the Crown in Council, but of the County Council or the Local Government Board which bring it into existence, define its area, control the exercise of its functions. The County Council in this respect has large powers which the Local Government Board can only control by petition or consent of the local authorities, or by provisional order confirmed by Parliament. The Urban District.

The urban district may be conterminous with a municipal borough, in which case the council of the borough exercises all the powers which the Public Health and Highway Acts, the Allotments Act, and other Statutes have conferred upon the Urban District Council.

Or the urban district may be a town which does not possess a charter under the Municipal Corporations Act. It is then governed, for the purposes of the Acts above referred to, by the Urban District Council. This is a body of councillors, elected for three years by the persons, male or female, who are on the Parliamentary or Local Government register, holding office for three years, incorporated, and capable of holding property, making rates and borrowing money with the consent of the Local Government Board.

The Poor
Law
Union.

But urban local government lacks the completeness which rural local government possesses. The Urban District Council does not administer the Poor Law. Side by side with the urban district and its council is the Poor Law Union, with its Board of Guardians, who are, since 1894, entirely an elected body.

Incom-
pleteness
of urban
govern-
ment.

The organization of the parish also is unchanged in urban districts. The sequence of Parish, District, and County Council, and the identity of the guardians of the poor with the district councillors is confined to rural districts.

Before leaving the subject of urban government it may be worth taking note of urban terminology.

A town.

Town is a term of very indefinite use. Blackstone says (Comm., vol. i. p. 115) that a town or township is synonymous with tithing or vill, and consists in the possession of 'a church with divine service, sacraments, and burials;' this he admits to be an ecclesiastical rather than a civil distinction, but he offers no other. He negatives the possession of a market as the differentia of a town, and suggests that it consisted in a *tithing* or group of ten families; but this was an association for police purposes. *City* used to be defined as a town which possessed or had possessed a cathedral, but it is now merely a term of distinction sometimes conferred on great towns by letters patent, as recently upon Birmingham and Dundee¹.

A city.

A borough. *Borough* was formerly defined as a town, corporate or not,

¹ London Gazette, Jan. 18th, 29th, 1889.

which sent members to Parliament, but the term is now properly applied to boroughs incorporated under the Municipal Corporations Act.

The county corporate was a town placed by royal favour in the position of a county, being exempt from the jurisdiction of the shire, possessing a sheriff of its own, having a separate commission of oyer and terminer and gaol delivery for the trial of offences committed within its boundary, and being for parliamentary purposes in a somewhat different position to other towns. But legislation as to municipal powers and on the subject of the franchise has reduced the distinction of these ancient borough counties to something merely nominal. A county corporate.

There remain the county boroughs of the Local Government Act, 1888. These are boroughs which either possess a population of not less than 50,000, or having a large population were also counties corporate. In these the mayor and council, as constituted by the Municipal Corporations Act, are invested with such larger powers as are conferred on the council of an administrative county. A county borough.

Local Government and the Central Executive.

The local administrative bodies which I have described are controlled for most purposes by the Local Government Board. Similar departments, somewhat differently constituted, exist for Scotland¹ and Ireland², the one presided over by the Secretary for Scotland, the other by the Chief Secretary to the Lord Lieutenant.

I confine myself to the consideration of English local government, and will note very briefly the history of the duties as to the Poor Law, as to the creation of local administrative bodies, and as to public health, which were assigned to the central department in 1871³.

(a) The Poor Law.

The administration of the Poor Law Amendment Act of 1834 was vested in Commissioners appointed for a term of five The Poor Law Board.

¹ 57 & 58 Vict. c. 58.

² 35 & 36 Vict. c. 69.

³ 34 & 35 Vict. c. 70.

years. This commission was renewed annually from 1839 to 1842, and was then re-appointed for five years. Its existence without a Parliamentary chief was not altogether happy¹, and in 1847 a Poor Law Board was constituted, consisting, like the phantom Boards which I have mentioned, of various great Officers of State, who with others nominated by the Crown were made, by letters patent, Commissioners 'for administering the relief of the poor in England.' One of these Commissioners was to be styled the President; the Commissioners were to appoint two Secretaries, and the office of President and of one of the Secretaries was made compatible with a seat in the House of Commons.

Its
history.

The President of the Poor Law Board with the Parliamentary Secretary was responsible to Parliament for the administration of the Poor Law from 1847 to 1871, and the office of President was held from time to time by a Minister of Cabinet rank. In 1871 the Poor Law Board ceased to exist, and its powers and duties were vested in the Local Government Board.

Its end in
1871.

34 & 35
Vict. c. 70,
s. 2.

(b) *Public Health.*

Until the year 1847 there was no general legislation on sanitary matters. The Municipal Corporations Act (1835) gave power to the towns, which were or might hereafter be included in it, to make by-laws on various local matters, including the prevention of nuisances, and certain towns obtained special Acts of Parliament to enable them to carry out improvements. These Acts specified the improvements and the local Commissioners by whom the improvements were to be effected and maintained. In 1847 were passed the Improvement Clauses Act and the Commissioners Clauses Act². These Acts supplied common forms, the one for the election, meeting, powers and duties of the local improvement Commissioners, the other for the nature, mode of execution, and machinery for payment in respect of the im-

Com-
mence-
ment of
sanitary
legisla-
tion.

Improve-
ment Acts.

¹ Bagehot, *English Constitution*, 189.

² 10 & 11 Vict. cc. 16, 34.

provements contemplated. Thus it was possible to make the local improvement Acts uniform and efficient.

In 1848 was passed the first Public Health Act¹. This Act empowered local authorities to deal with many matters relating to health, drainage, water supply, removal or prevention of nuisances, offensive trades, street paving, common lodgings, burial-grounds. Public Health Act, 1848.

The powers so created might be exercised by three different bodies. The Town Council, where the town was incorporated under the Municipal Corporations Act; the Improvement Commissioners, where these existed apart from a municipal corporation; the Local Board, a new institution, which might be brought into existence by Order in Council, on petition of the ratepayers addressed to a newly constituted *Board of Health*, or on the initiative of this Board where the sanitary arrangements of a district were especially bad. The Board of Health, The Board of Health, variously constituted, acted as a central authority in sanitary matters for ten years, from 1848 to 1858, when it was allowed to expire. Its functions as regarded the prevention of diseases were assigned to the Privy Council, while those which related to the constitution of Local Boards fell to the Home Office, under the provisions of the Local Government Act of 1858. its duties transferred

This Act amended the provisions of the Public Health Act, 1848, mainly as to the constitution and powers of the local authorities. The intervention of the Privy Council was no longer needed for their creation. A resolution of the Town Council in case of a municipal corporation—a resolution of the improvement Commissioners in a town which was under a local improvement Act, a resolution of the ratepayers in places which had neither a Town Council nor an improvement Act, but did possess a defined boundary²—might be laid before one of Her Majesty's Principal Secretaries of State, in

¹ 11 & 12 Vict. c. 63.

² A place which did not possess a known boundary had to petition the Home Secretary to settle its boundaries before it could proceed to the constitution of a local authority.

to the
Home
Office

practice the Home Secretary. A vote of the ratepayers so signified to the Home Secretary, and published by him in the London Gazette, was enough to constitute the Local Board. The exercise of their powers by these Boards was controlled by a sub-department of the Home Office, called the Local Government Act Office.

and Privy
Council ;

From 1858 to 1871 the Home Office created and controlled local sanitary authorities, and the Privy Council enforced sanitary rules. This arrangement proved cumbrous in working. The functions of government connected 'with the supply of requisites for public health as at present regulated, after wandering through a labyrinth of local authorities, may be traced up to no fewer than three chief offices, the Privy Council, the Home Office, and the Poor Law Board ; whilst certain collateral matters find their way to the Board of Trade.' So ran the report of the Sanitary Commission of 1869.

and in
1871 to
Local
Govern-
ment
Board.

In 1871 the duties of Home Office and Privy Council alike were assigned to the newly-constituted Local Government Board. In 1872 the whole of England and Wales was divided into rural and urban sanitary districts. In the former the Board of Guardians constituted the local sanitary authority, in the latter the Local Board above described.

In 1875 the Public Health Act¹ consolidated the law upon the subject, and gave increased powers to the Local Government Board for creating and dissolving local sanitary authorities, for defining or changing their boundaries, and merging one district with another or turning that which was rural into urban, for instituting inquiries and compelling defaulting authorities to do their duty, either on its own initiative or at the instance of persons aggrieved². The district Council has now become the rural sanitary authority, and in towns either the Urban District Council or the Municipal Corporation administers the laws relating to Public Health.

¹ 38 & 39 Vict. c. 55.

² The history of sanitary legislation, from the point of view of the expert in sanitary matters, is fully set forth in *English Sanitary Institutions*, by Sir John Simon.

(c) General control.

The Local Government Acts of 1888 and 1894 have brought the central authority into very various relations with the newly-constituted local authorities.

Our scheme of local government is as yet very incomplete. 'Speaking generally, the control of local bodies by the Central Department is needlessly meddlesome and minute in some directions, and very imperfect in others ¹.' Duties which might well devolve upon the County Council are undertaken by the Local Government Board. It cannot be necessary, for instance, that the accounts of every parish should be audited at Whitehall, or that the sanitary affairs of every urban district should be under the direct control of the Central Department. Nor is it easy to disentangle the mass of statute law in which the powers and duties of local bodies must be painfully sought. In form as well as in substance the law concerning our local institutions may well be improved.

SECTION II.

THE ADJACENT ISLANDS.

§ 1. *The Isle of Man.*

The Isle of Man has been in allegiance to the English History. Crown since the reign of Henry IV, but subject to its own laws and the jurisdiction of its own courts. From the reign of Henry IV to 1735, with an interval in the reign of Elizabeth, it was held of the Crown in fee by the House of Stanley. The tenure was on the terms of doing homage, and rendering two falcons to the King or Queen at the coronation. It then passed by inheritance to the Dukes of Athole, by whom the feudal rights were sold to the Crown in 1765 ².

¹ Wright and Hobhouse, *Local Government and Taxation in England and Wales*, ed. 2, Introduction, xviii.

² 5 Geo. III, c. 26, called the Act of Revestment.

Certain manorial rights were reserved, and the ecclesiastical patronage. These were bought by the Crown in 1829¹.

The Crown is represented in the government of the Island by a Lieutenant-Governor, who is appointed by warrant under the sign manual, accompanied by a royal letter of Executive instructions. The officials of the prison and the police are responsible to him; he has the appointment to office in these departments and also in the militia, a local defensive force of parish and town companies. These powers are exercised in subordination to the Home Secretary, without whose permission the Governor cannot leave the Island.

Legisla-
ture. The legislature of the Island consists of two Houses, the Governor in Council and the House of Keys, the two sitting in session making up the Court of Tynwald. The Acts of this body require for their validity the assent of the Crown in Council.

The control of the customs duties, the determination of their amount and their collection rest with the Imperial Parliament and executive. The disposal of surplus revenue, after meeting the expenses of government, and paying £10,000 to the Consolidated Fund, lies with the Court of Tynwald.

Council. The Council of the Island consists of the Governor, Bishop, Archdeacon, Vicar-General, Attorney-General, Clerk of the Rolls, two Deemsters, and the Receiver-General; all these officers are appointed by the Crown, except the Vicar-General, who is appointed by the Bishop. The members of the House of Keys are twenty-four in number. Until 1866 they held seats for life, but could resign with the consent of the Governor. Vacancies were supplied by the selection of one from two names submitted to the Governor by the House.

House of
Keys. The House of Keys would seem to have been in its origin a judicial body, which may explain its want of initiative in the disposition of revenue. The Act of 1866 made its members representative. Six *sheadings*, corresponding to

¹ The purchase was authorized by 6 Geo. IV, c. 34.

counties, return three members each, the town of Douglas returns three, and three other towns each return one¹. The duration of the House is seven years, unless dissolved earlier by the Governor.

The Deemsters hold weekly courts of criminal jurisdiction, having power to give sentence not exceeding two years imprisonment. The Governor sitting with the two Deemsters and the Clerk of the Rolls forms a Court of Chancery, Exchequer, Common Law and Gaol Delivery. The Staff of Government, a Court of Appeal from inferior jurisdictions, is similarly constituted. Judica-
ture.

The Island is subject to the legislative power of Parliament, but is not bound by Statutes unless specially named therein. The writ of Habeas Corpus runs in the Island, and an appeal lies from the decrees and judgements of the Governor to the Crown in Council.

§ 2. *The Channel Islands.*

There are two governments in the Channel Islands—Jersey, and Guernsey with its dependencies. The immediate link with the central executive consists in each case of a Lieutenant-Governor appointed by the Crown on the recommendation of the War Office after consultation with the Home Office. But the powers and duties of these officers are not so extensive as are those of the Lieutenant-Governor of the Isle of Man: the Islands possess legislative and judicial institutions of their own, and are very tenacious of their rights in respect of them.

Jersey.

The constitutional history of Jersey is not uninteresting, and may be briefly sketched.

With the other Islands it was a part of the Duchy of Normandy: it passed to the English Crown when the Duke of Normandy became King of England, and remained to the English Crown when Normandy was lost. History.

¹ The franchise is, in shreadings, an £8 ownership and £12 occupation qualification; in towns, an uniform £8 qualification.

Constitutional development.

The Island was governed by a Warden or Bailiff acting as representative of the King, and occupying very much the position of a Sheriff of an English county, but there seems no evidence of the existence of any popular or representative body corresponding to the County Court. Like the Sheriff his judicial powers were limited, and itinerant justices came from the King's Court to hold pleas of the Crown. In the reign of John a body described as *duodecim coronatores jurati*, was entrusted with the custody of the pleas of the Crown, and with them the Bailiff was empowered to try certain suits relating to land. At some later dates these *jurats* were ordered to be chosen, for life, from among the inhabitants of the Island 'per ministres Domini Regis et optimates patriae,' and permitted to deal with cases of all sorts except treason, and assault upon the King's Officers.

The Court.

This body, the Bailiff and *jurats*, acted not only as a Court, but as a local legislature making by-laws or ordinances in matters of domestic concern relating to markets, prices, police, and public health.

The Governor and Bailiff.

In the reign of Henry VII the position of the Bailiff underwent a change: he had become a nominee of the Captain or Governor of the Island. In fact the chief executive office of the Norman times had become duplicated. The Warden or Governor was a great personage who entrusted the civil government to a deputy, the Bailiff. These offices were now placed on a more equal footing; both were nominated by the King, the Bailiff was at the head of the local government, the Governor was confined to military and political functions, and represented the external power of the Crown. For the purpose of making Ordinances the Bailiff and *jurats* from time to time summoned to their assistance *the States*, consisting of the rectors and constables of each parish. The constables were chosen by the parishioners, and the two bodies would correspond to the estates of the Clergy and the Commons in England.

The States.

The Code of 1771.

In due time the States made the inevitable claim to be

consulted, not at the pleasure of the Royal Court, but of right; and in 1771 a code of laws for the Island was confirmed by Order in Council¹, and it was laid down that no laws or ordinances should be passed, either provisionally or with the intention that they should receive the assent of the Crown in Council, unless by the whole Assembly of the States of the Island.

We may now therefore consider the composition and powers of this Assembly of the States.

First there are the nominees of the Crown. The Lieutenant- or Deputy-Governor has a right of veto, but no vote. The Bailiff, who presides, has a casting vote, but no other. The Attorney- and Solicitor-General have a right to be present, and to take part in debate, but have no vote. The *Visconte*, who discharges the executive functions of Sheriff and Coroner, has a seat, but no right to speak or vote².

Next come the members of the Royal Court, the twelve jurats elected for life by the ratepayers of the Island. They must be native islanders, must possess real property of £720 in value, and are prohibited from the exercise of certain trades.

Last come the States, the twelve rectors of the parishes, appointed for life, and holding their seats *ex officio*; the twelve constables of the parishes, holding their seats *ex officio* and their offices for three years from the date of election³: the fourteen deputies, three for the parish of St. Helier, and one for each of the others: for these a triennial election is held in the month of December.

The legislative powers of the States are limited. Permanent legislation needs the assent of the Crown in Council. Provisional Ordinances may be made for local or immediate purposes, and these do not require to be expressly allowed. They do not remain in force for more than three years, but they may be renewed.

¹ March 28, 1771.

² Order in Council, March 19, 1824.

³ The constables are chosen by the *principaux* of their respective parishes; these are parishioners owning property of the annual value of £160 and upwards.

Veto and
Dissent.

But all legislation, permanent or temporary, is subject to the *veto* of the Governor, or the *dissent* of the Bailiff¹. The *veto* at once brings the proposed measure to nought. The *dissent* corresponds to the reservation of a Colonial Act by the Governor of a colony. It suspends the operation of measures until the Queen in Council has considered and allowed them.

Taxing
powers.

The taxing powers of the States are also limited. The *hereditary revenues* of the Crown are collected by a Receiver General, and applied to official salaries and other purposes connected with the government of the Island. *The general levies*, taxes falling on property, need the sanction of the Crown, unless the money is needed for special and sudden emergency. The *impôts* or duties on wine and spirits are levied under the authority of letters patent of Charles II, which provide for their application to specified local purposes.

Imperial
Statutes.

The islanders have claimed that neither Act of Parliament nor Order in Council is of force in the island unless passed with the concurrence of the States. As regards Parliament, the claim, if seriously made at all, is made with reference to domestic as opposed to Imperial legislation: and Parliament would probably be unwilling to legislate on the domestic affairs of the Island without the good will of the States. For this reason the wretched judicial system of the Island remains unreformed. Acts of Parliament which affect the Island are transmitted thither by Order in Council, which directs that they should be registered and published; but this registration in no way adds to the binding force of the Statute.

Orders in
Council.

There is a more grave dispute as to the right of the Crown to legislate by Order in Council without the concurrence of the States. It is maintained that no Order in Council may be put in force until it has been presented to the Royal Court for registration; that such registration may be suspended if the Order infringes the ancient laws and privileges of the

¹ Order in Council, June 2, 1786.

Island¹: and further that the making of an Order in Council without the concurrence of the States is an infringement of these privileges.

I will not pronounce upon a question which a Committee of the Privy Council have recently evaded². It is sufficient to say that the rights of the Crown are asserted, and that they are contested except as regards the exercise of the prerogative of mercy³.

The Royal Court which gradually became not merely a Court of Justice, but a local legislature, and was later compelled to share its legislative powers with the States, is still the Island judicature. The Bailiff and jurats are the judges, but the jurats who are elected as members of the legislature do not necessarily know the law; being unpaid, they are under no obligation to learn it, and being elected for life, they are independent of criticism. The Bailiff, who is appointed by the Crown, is always a qualified lawyer, and receives an income from fees and direct payment of £720; but his opinion is of less weight than that of the ordinary jurat. He has no vote upon a judicial decision unless the jurats are equally divided: it has even been doubted whether, except under these circumstances, he may express an opinion.

¹ These words are the substance of an Order in Council of May 21, 1679. This was repealed by an Order of December 17, 1679, to the effect that no Orders, save those which related to the public justice of the Island, needed registration for their enforcement. It is alleged that the Code of 1771 repealed the December Order and re-enacted the May Order. Even if this were so—and it seems open to doubt—the States would have to show that the ancient laws and privileges of the Island were infringed by legislation by Order in Council.

² The question came before the Committee of the Privy Council in 1894. An Order in Council had been made in 1891, regulating the Chairmanship of the Prison Board for Jersey. The States declined to register this Order and asked that it might be recalled, alleging among other reasons, that the Crown had no power to legislate for the Island without the consent of the States. The Committee of the Privy Council found other grounds for advising the Queen to comply with the wishes of the States. For the purposes of the argument a mass of information was collected, to which, by the kindness of the Right Honourable James Bryce, I have had the opportunity of referring.

³ *In re Daniel*. Order in Council, January 12, 1891.

The
Courts.

The Court, thus constituted, sits either as a Court of first instance, when it consists of the Bailiff and two or three jurats, the *nombre inferieur*; or as a Court of Appeal, the Bailiff and seven jurats, the *nombre superieur*.

The
Executive.

The Executive in Jersey is appointed, paid by, and responsible to the Crown. The Lieutenant-Governor directly represents the Crown for all military purposes, and for the exercise of the veto upon legislation. He is the medium of communication between the Island and the Home Government. In his military capacity he is responsible to the War Office; for other purposes to the Home Office.

Guernsey.

Guernsey.

The Bailiwick of Guernsey includes the adjacent Islands. The constitution of these differs only in details from that of Jersey. A Lieutenant-Governor represents the Crown here

The Royal
Court.

as in Jersey. The Royal Court, or *Chefs Plaids*, consisting of the Bailiff and twelve jurats, exercises legislative and judicial functions. It claims in its legislative capacity at certain sessions to make regulations called *Ordonnances*, which are of force in so far as they do not conflict with an Order in Council, or law emanating from a higher authority. These *Ordonnances* are in theory limited to regulations for the better enforcement of existing law. If they go further they need the assent of the Crown in Council. The Royal Court also formulates legislation which is submitted to the States: if approved by the States the proposed enactment is submitted to the Crown in Council, and if there confirmed becomes law¹.

The States are representative of the entire community: they consist of two bodies: the larger, for the purpose of electing the jurats, a smaller one for purposes of legislation.

The États
d'élection.

The larger body, the États d'élection, consists of the Bailiff and jurats, the rectors of eight parishes, the *douzeniers*²,

¹ Second Report on the State of the Criminal Law in the Channel Islands, Guernsey, 1847-8, pp. xi-xv.

² The *douzaine* is the parish council which provides for the relief of the poor, and the repair of roads, and makes the parochial rates.

elected for life by the ratepayers of the eight parishes from among those who have served the office of constable. The number of *douzeniers* sent by each parish varies, but the total number is 180. These, with twenty constables elected by the ratepayers for three years, make up the États d'élection.

The États de délibération is a smaller body. The *douzeniers* of each parish, with the constable form a parish council, and these attend personally at the États d'élection, but by deputies at the États de délibération; the number of deputies is thus reduced to six from the town parish and its adjoining cantons, and nine from the county parishes. The États de délibération.

The États de délibération may tax within limits, and approve or reject legislation submitted to them from the *Chefs Plaids*. Their taxation, if it exceed certain limits, and their legislation in any event, needs the approval of the Crown in Council.

The Court of Guernsey, like that of Jersey, consists of the Bailiff and not less than two of the twelve jurats, an unskilled and unpaid body of men, appointed by popular election, for legislative rather than for judicial purposes. It exercises a criminal jurisdiction throughout the Bailiwick, and an appellate jurisdiction from the Court of Alderney. Judicature.

Alderney has its Court, its States, and its Executive, but the States of Guernsey may legislate for Alderney, subject to disallowance by the Queen in Council, and an appeal lies from the Court of Alderney to the Court of Guernsey, subject to an appeal to the Judicial Committee of the Privy Council.

Sark has a similar Court with limited criminal jurisdiction.

The Channel Islands are in the diocese of Winchester; there are twelve rectories in Jersey, eight in Guernsey, and a perpetual curacy of Alderney, all in the gift of the Crown on the recommendation of the Secretary of State. The Deans of Jersey and of Guernsey hold rectories in their respective Islands. The Church.

SECTION III.

THE COLONIES.

§ 1. *The Colonial Office.*

The earliest colonies were acquired by conquest or discovery, and in the latter case were often regulated by a charter granted to a company or an individual. Their connexion with the central government was through the King in Council.

The Board
of Trade
and Plan-
tations.

At the Restoration the affairs of the colonies were entrusted to a Committee of the Privy Council, and very shortly after to a Commission created by letters patent. This body was in 1672 combined with the Council for Trade, but in 1675 the commission was revoked, and the Privy Council resumed the management of colonial business. In 1695 the Commission of 1672 was revived as the Board of Trade and Plantations, but its powers were limited: its duty was to collect information, to report to the King in Council, and to give advice when required. The executive work was done by the Secretary of State for the Southern Department. The Board coexisted from 1768 to 1782 with a third Secretary of State for the Colonies. In 1782 the Board and the third Secretaryship were abolished¹. Communications from the colonies were to be addressed to the Privy Council, the executive business was transacted through the Home Office, and in 1784 a Committee of the Privy Council was constituted for Trade and Foreign Plantations. This Committee has passed into the Board of Trade². In 1794 a third Secretary of State was appointed, who in 1801 was definitely described as Secretary of State for War and the Colonies. Through him was exercised the royal prerogative in respect of the colonies; and in 1854 he was relieved of his duties in the department of war. The Committee of Trade and Foreign Plantations still exists concealed behind the President of the Board of

The
Colonial
Secretary.

¹ 22 Geo. III, c. 82.

² See above, p. 189.

Trade¹. But the Secretary of State with a Parliamentary and a permanent under-secretary and a large clerical staff constitutes the Colonial Office.

We have now an authoritative definition of a colony. It is:—

‘Any part of Her Majesty’s dominions, exclusive of the British Islands and of British India; and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one colony².’ A colony defined.

Colony, then, means any part of the Queen’s dominions except the United Kingdom, the Channel Islands, the Isle of Man, and British India. It is a geographical and not a political term, and does not imply any form, still less any special form, of government, nor is it precisely coextensive with the functions of the Colonial Secretary. Cyprus is not a British possession, but is administered through the Colonial Office. Ascension falls under the definition of a colony, but is governed by the Admiralty.

§ 2. *Forms of colonial government.*

The forms of government prevailing in our various colonies must here be treated almost entirely in their relations to the central executive. It would be impossible to deal in short compass with their history and general character³. Forms of colonial government,

The forms of colonial government fall into four fairly distinct groups. When these are briefly described I can state some rules of general application to the relations of the colonies with Parliament and the Crown. are four.

¹ The Committee of Council which before the constitution of the judicial Committee in 1833 heard appeals from the Colonies, as well as from India and the Channel Islands, was a different body, apparently, from the Committee on Trade and Foreign Plantations. See Lord Selborne, *Judicial Procedure in Privy Council*, 23.

² 52 & 53 Vict. c. 63, s. 18, sub-a. 3.

³ For a fuller account of the constitution of the various colonies I must refer the reader to the *Colonial Office List* for 1896, and to *House of Commons Returns*, No. 70 of 1889, No. 194 of 1890 as to ‘Colonial Executives, Representative Assemblies, and Electorates.’

From the outset, however, these general principles must be borne in mind—that the Crown in Parliament can, at its pleasure, legislate for all the colonies, that the Crown in Council can also legislate for some—that the Crown has a veto on all colonial legislation,—that the Crown is represented in every colony by an officer at the head of its executive government, usually called *the Governor*,—and that the Crown has a control varying in extent and character over the composition of the executive in each colony.

Colonies
with no
legisla-
ture.

A. In the first group must be placed those colonies wherein legislative as well as executive powers are vested in the Governor alone. Such are Gibraltar, Labuan, and St. Helena, where power is also reserved to the Crown to legislate by Order in Council.

Three South African colonies are in a position substantially similar—Bechuanaland, Basutoland, and Zululand. In 1878 the Queen created the office of High Commissioner for South African affairs, and the Governor of Cape Colony is appointed by a general commission to this post. To this officer has been assigned ¹ the government of the territories of Bechuanaland and Basutoland (the former annexed in 1885, the latter in 1884), with power to make laws by proclamation and to appoint the necessary officers for the peace and good government of the communities. Zululand stands in the same relation to the Governor of Natal, and is administered in like manner by an officer whom he nominates. No power is reserved to the Crown to legislate by Order in Council in respect of these colonies.

Colonies
with a
nomi-
nated
legis-
lature.

B. In the second group of colonies, government is conducted by a Governor with an executive council, and laws are made by the same Governor with a legislative council, but both

¹ He governs Bechuanaland by Commission given to him as Governor of the Cape Colony, and Basutoland in virtue of an Order in Council (Feb. 2, 1884) vesting the government of that territory in the High Commissioner.

councils are nominated by the Crown or by a Governor as representing the Crown.

There are seventeen colonies of this sort, two of which are subordinate to other colonial governments of a more advanced type, the Seychelles Islands to Mauritius, the Turks and Caicos Islands to Jamaica¹. The constitutions of these colonies² are framed or approved by the Queen in Council. Her rights in this respect come from five sources.

First, Colonies acquired by conquest or cession are subject to the legislative powers of the Crown expressed by Order in Council. This does not of course exclude the powers of Parliament, but it enables the Crown to constitute the office of Governor by letters patent, and by the terms of the letters patent, or by the instructions given to each individual Governor, to provide from time to time for the government of the colony. The majority of the colonies which I have named are thus governed.

(a) Sources of royal power. Conquest or cession.

Secondly, the British Settlements Act (1887) affects all new settlements where there is no existing civilized government, and certain settlements of older date. It enables the Crown—

(b) The British Settlements Act.

‘To establish such laws and institutions, and to constitute such courts and officers, and make such provisions and regulations for the proceedings in the said courts, and for the administration of justice as may appear to Her Majesty in Council to be necessary to the peace, order, and good government of Her Majesty’s subjects and others within any British settlement.’

The Queen may delegate these powers in certain forms and subject to certain restrictions to any three or more persons

¹ The administrator of the Seychelles receives instructions on certain matters from the Governor of Mauritius. The Legislature of Jamaica makes laws on certain subjects for the Turks Islands and the Governor of Jamaica nominates the non-official members of their legislative board.

² British New Guinea, Ceylon, The Falkland Islands, Fiji, Gambia, The Gold Coast, Grenada, Honduras, Hong Kong, Lagos, St. Lucia, St. Vincent, Sierra Leone, Straits Settlements, Trinidad. Of this list Grenada, St. Lucia and St. Vincent, constitute a separate group—the Windward Islands—each enjoys its own institutions, but there is one Governor for all three islands.

within the settlement, but the right to legislate by Order in Council is reserved¹.

The colonies specifically affected are the settlements on the west coast of Africa and the Falkland Islands.

Thirdly, the Straits Settlements were separated from India and became a Colony in 1866. Powers were given to the Crown in Council by 29 & 30 Vict. c. 115 similar to those contained in the British Settlements Act (1887).

Surrender
of Consti-
tution.

Fourthly, some colonies with elected legislative bodies have surrendered their constitutions by local Acts, and requested the Crown to make such constitutions as might be deemed advisable². Parliament has sanctioned this surrender by Statute³, and the Queen in Council has accordingly framed constitutions by letters patent and instructions to Governors, and has reserved power to legislate further, if need be, by Order in Council.

Local en-
actment.

Fifthly, Honduras, a colony with an elective legislative body, recast its constitution by a local Act placing the nomination of its legislature in the hands of the Crown. This Act received the assent of the Crown in Council, and no further powers of legislation by Order in Council are reserved.

The government of all these colonies except Honduras is provided for in three documents. By *letters patent* under the Great Seal the office of Governor is constituted, the executive and legislative councils created, and the framework of the constitution laid down. By *commission* under the sign manual and Signet the Governor is appointed. *Instructions*, also under the sign manual and Signet, set forth in detail the composition and procedure of the legislative and executive bodies, enumerate the subjects on which no legislation may take place unless

¹ 50 & 51 Vict. c. 54, s. 2, 3.

² Jamaica acted thus in 1866, and Grenada, St. Vincent and Tobago in 1876. Jamaica re-acquired an elected legislature in 1884, but Grenada remains a Crown colony. Tobago had been an independent colony of the Windward Islands, but by its own desire was united with Trinidad by Statute, 50 & 51 Vict. c. 44.

³ 29 Vict. c. 12 (Jamaica), 39 & 40 Vict. c. 47 (Grenada, St. Vincent, Tobago).

reserved for the sanction of the Crown in Council, and define the relations of the Governor to the courts of the colony¹.

In the case of Honduras the letters patent do not create the legislative body; it is nominated under the local Act of 1870.

C. The third group of colonies possesses legislative assemblies wholly or partly elected, while the executive council is nominated by the Crown or the Governor representing the Crown.

Colonies with elected legislature and nominated executive.

In the Bahamas, in Barbados, and in Bermuda there are two chambers, one nominated by the Crown, one elected by the people.

In British Guiana, Jamaica, the Leeward Isles, Mauritius, Malta, there is one assembly composed partly of official or nominated, partly of elected members. Thus the legislature is wholly or partly responsible to the people, while the executive is responsible only to the Crown. These constitutions have all been framed or approved by the Crown in Council, except that of the Leeward Islands, which was settled by Statute in 1871².

D. Colonies in the most advanced stage of development possess what is called *responsible government*, by which phrase is meant that the principal government departments are administered by political chiefs who are responsible not merely or mainly to the Crown but to the elected legislature.

Colonies with responsible government.

In these the executive consists of a Governor appointed by the Sovereign, and a body of officers of state nominated not by the Crown but by the Governor. The legislature in each

Legislature.

¹ Forms of Commission and Instructions will be found in Appendix II.

² By 34 & 35 Vict. c. 107 the constitution of the Leeward Islands is a Federal Union of five islands. Each has a legislature and Governor; in three, St. Kitts, Nevis, Montserrat and the Virgin Islands, the legislature is nominated by the Crown, those of Antigua and Dominica are partly elected and partly nominated. The General Legislative Council is twenty in number, ten elected and ten nominated, with statutory power to legislate for the entire group on specified matters of general interest, and with power to legislate on other matters on the request of the local assemblies.

of these colonies consists of two chambers, one usually called the legislative council or senate, the other the legislative assembly. The latter, which is the larger, is always elected: the qualification for the franchise varies in character, but is uniformly low. The former is in some cases nominated by the Governor on the advice of his executive council, in others it is also elected, the constituencies being differently arranged and the qualification for the electorate being higher.

Executive. The executive council is sometimes, as in New South Wales, or Queensland, coextensive with a group of departmental chiefs changing with the rise and fall of party majorities: sometimes, as in Victoria or Canada, the Cabinet on leaving office remain members of the executive council, though they cease to attend its meetings except to assist the Governor in transacting formal business, or to advise on non-political questions¹.

The essential feature of a colonial constitution of this type may be seen in a clause in the Act of the Victorian Parliament which formulated the existing constitution.

Meaning
of respon-
sible
govern-
ment.

§ 37. The appointments to public offices under the Government of Victoria, hereafter to become vacant or to be created, whether such offices be salaried or not, shall be vested in the Governor, with the advice of the Executive Council, *with the exception of the officers liable to retire from office on political grounds* which appointments shall be vested in the Governor alone².

The introduction into the Victorian Statute of a rule which is merely a convention of the English constitution is of itself a curious illustration of the way in which custom crystallizes into law. But it must be confessed that to one who did not know the custom the words would be obscure. An officer liable to retire 'on political grounds' is a departmental chief or member of the Cabinet who goes out of office when his party has ceased to be in a majority in the elected legislature.

¹ Jenks, *The Government of Victoria*, p. 273.

² The Act is in the Schedule of 18 & 19 Vict. c. 55.

Subject to certain marks of subordination, with which I will presently deal, the constitution of the self-governing colonies is a reproduction of our own.

The colonies which are thus governed are :—The Dominion of Canada, Newfoundland, New South Wales, New Zealand, Queensland, Natal, Western Australia, the Cape of Good Hope, South Australia, Tasmania, Victoria.

In the first six of these the senate or legislative council is nominated by the Governor, in the last five it is elected by constituencies.

But the Dominion of Canada differs from the other self-governing colonies in this, that it is a Federal Union¹, constituted by Act of Parliament, consisting of a central government and eight provincial governments—Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, Prince Edward's Island, British Columbia and the North-West Territories.

Each of these provinces possesses a separate legislative assembly; Quebec, Nova Scotia, and Prince Edward's Island possess second legislative chambers. In the first two the members of these chambers are nominated by the Lieutenant-Governor: in Prince Edward's Island they are elected. All the provincial legislatures have the power of altering their constitution except in respect of the office of Lieutenant-Governor, who represents the Crown in each Province as the Governor-General does in the Dominion. In other respects the legislative powers are strictly limited by the Act which constituted the Federation. Thus, the provincial legislatures have the exclusive right to make laws on certain matters of local interest; the Dominion Parliament has the exclusive right to make laws on certain matters of general interest; while there is a concurrent legislative power on all other

¹ The Act, 48 & 49 Vict. c. 60, constituting a Federal Council for Australasia, empowers the Australian colonies, Tasmania, New Zealand, and Fiji, or any of them, to form a council with power to legislate for such colonies as are represented on the council. The Act is permissive, and there is no Federal executive to enforce the enactments of the Federal Council; perhaps for these reasons it has as yet produced no great results.

matters; but if the Act of a provincial Parliament should be repugnant to any such law, it is, to the extent of such repugnancy, inoperative.

Federal
executive.

The executive of the Dominion is the Queen represented by a Governor-General, who acts upon the advice of his Privy Council, or rather of those members of it who form the Ministry or Cabinet.

He appoints the Lieutenant-Governors of the Provinces, each of whom must act on the advice of officers responsible to the local Parliaments, as the Governor-General acts on the advice of officers responsible to the Dominion Parliament.

The
Supreme
Court of
Canada.

In case of controversy between the Dominion and a provincial government, the Supreme Court of Canada must interpret the constitution as framed in the British North American Act¹, subject to an appeal to the judicial committee of the Privy Council.

The constitutions of the self-governing colonies rest upon imperial statutes giving force to acts of the colonial legislatures. The Cape of Good Hope is an exception. It was a Crown colony; it obtained an elective legislature by letters patent in 1850, and responsible government by an Act of this legislature, approved by the Crown in Council in 1872.

In the self-governing colonies letters patent are issued constituting the office of Governor, delegating to him certain prerogatives, as that of mercy, and, in colonies other than the Dominion of Canada, creating and regulating the functions of the executive council. Royal instructions are also issued, but of a less detailed character than in the case of Crown colonies, and the Governor is appointed by a commission under the sign manual and Signet.

§ 3. *General rules of colonial government.*

It is possible to lay down certain principles which govern the relations of the Crown and Parliament to all the colonies which I have described.

¹ 30 Vict. c. 3.

The first of these principles is the legislative subordination ^{(1) Legis-} of the colonies to the Imperial Parliament. It may be stated ^{lative} in two propositions. ^{subordin-}
^{ation.}

The Crown in Parliament can make laws which are binding on any part of the Queen's dominions¹.

If a colonial legislature make a law which is repugnant to Imperial any Act of Parliament intended to bind the colony, the Act of ^{Parlia-} the colonial legislature is, to the extent of such repugnancy, ^{ment can} absolutely inoperative². ^{legislate.}

The second of these principles finds expression in the veto ^{(2) The} upon all colonial legislation, which can be exercised either by ^{Royal veto} the Crown in Council or the Crown acting through its representative, the Colonial Governor. This check on colonial legislation may be exercised in various ways, thus:—

No Bill of a colonial Parliament can become law until it ^{exercised} receives the assent of the Governor, who stands to the colonial ^{by the} legislature in the relation of the Crown to the Imperial Parlia- ^{Governor,} ment. He may refuse his assent, and the Bill is then lost.

He may neither assent to the Bill nor reject it, but reserve it for the consideration of the Crown: or he may assent to a Bill containing a clause which suspends its operation until it has received the royal confirmation. In these cases the Bill remains dormant until the pleasure of the Crown is signified.

Or the Bill may receive the assent of the Governor. It ^{by the} then becomes law at once. But it must nevertheless be ^{Crown in} reported to the Secretary of State for the Colonies, and he ^{Council.} may advise the Crown to disallow the law. Should he do so, the Queen's pleasure is signified, in the case of the self-governing colonies, by Order in Council, in the case of the Crown colonies by despatch.

Until legislative powers are granted to colonies, the Crown ^{(3) Legis-} can legislate for them by Order in Council. ^{lation by}
^{Order in}
^{Council.}

This statement may now be made without distinction between colonies acquired by conquest or cession and colonies

¹ Dicey, *Law of the Constitution*, 3rd ed. 97-112.

² The Colonial Laws Act, 28 & 29 Vict. c. 63, s. 2.

formed or acquired by settlement¹; for the British Settlements Act, 1887, has given full powers to the Queen to legislate and establish the necessary Courts of Justice in all new settlements made within the dominion of the Crown.

The distinction, however, should be noticed.

Dis-
tinction
between
Crown
colonies
and
settled
colonies.

Colonies acquired by conquest or cession fall at once under the legislative powers of the Crown in Council, subject always to these limitations—that Parliament might intervene and make provision for the government of the colony², and that the Crown could not make laws ‘contrary to the fundamental principles’ of English law, nor presumably enforce such laws if found prevailing among the colonists at the time of cession.

Colonies acquired by settlement do not seem (before 1887) to have been subject to the legislative power of the Crown in Council, unless made to be so by statute. The matter is somewhat obscure. The settlers are said to take with them the law of their own country, and the Crown is said to be able to establish Courts to enforce that law. But the question arises, How much of the law of their country did the settlers take? Did they take any but the common law?

Limita-
tions on
preroga-
tives as to
settled
colonies.

‘In the case of a settled colony the ecclesiastical law of England cannot be treated as part of the law which the settlers carried with them from the mother-country.’

Such were the words of the Judicial Committee³, and there seems to have been some doubt in the minds of the Law Officers of the Crown as to the power of the Crown to create a Court of Equity in a settled colony without consent of Parliament⁴. But the matter need not detain us, for, as to

¹ Colonies may be formed in uncivilized parts of the Queen’s dominions. Power to legislate and establish courts in respect of these was given by 23 & 24 Vict. c. 121. They may also be acquired by settlement in uncivilized regions outside the Empire. The Act of 1887 covers both classes.

² ‘There cannot exist any power in the King exclusive of Parliament.’ Lord Mansfield in *Campbell v. Hall*, 20 State Trials, 304.

³ In *re Bishop of Natal*, 3 Moore P. C. N. S. 152.

⁴ The Crown cannot erect a Court of Chancery or conscience, for the common law is the inheritance of the subject. Comyns, Digest, Prerog., D. 28, and see Forsyth, Cases in Const. Law, 174, where the opinion of Sir J. Scarlett and Sir N. Tindal is set forth.

Crown colonies, the law is clear ; as to future settled colonies the law is also made clear ; as to existing settled colonies their constitutions are also settled, and the Crown has either acquired power to legislate by Order in Council or it has not. So we may pass to the next rule.

When the Crown has granted a legislative assembly¹ to a colony, its powers of legislation by Order in Council, unless expressly reserved, are at an end.

Grenada was a Crown colony : the King could make laws and levy taxes. In October, 1763, he issued a proclamation promising to the colony a representative legislative assembly. In April, 1764, he gave a commission to the Governor to summon such an assembly to make laws in the usual forms. In July, 1764, he issued letters patent imposing upon Grenada a duty, already imposed on the other Leeward Islands, of 4½ *per cent.* on all exported goods in lieu of other customs or import duties. Campbell paid the duty and sued Hall, the collector, for the amount. Lord Mansfield in giving judgement for the plaintiff said :—

We think that by the two proclamations and the commission to Governor Melville, the King had immediately and irrevocably granted to all who did or should inhabit or who did or should have property in the island of Grenada—in short to all whom it might concern—that the subordinate legislature over the island should be exercised by the assembly in the same manner as the other provinces under the King.

And therefore, though the right of the King to have levied taxes was good, and the duty reasonable, equitable and expedient ; yet by the inadvertence of the King's servants in the order in which the several instruments passed the office (for the Patent of July, 1764, for raising the impost should have been first) the order is inverted, and the last we think contrary to and a violation of the first, and therefore void.

How proper soever the thing may be respecting the object of

¹ The cases and text-books do not distinguish, in this matter, a representative from a nominated legislature, but it must be presumed that the rule laid down by Lord Mansfield would only apply to the former.

these Letters Patent, it can only now be done by an Act of the assembly of the island or by the Parliament of Great Britain¹.

(5) Appeals to the Crown in Council.

It is the settled prerogative of the Crown to receive appeals in all colonial causes. The Privy Council used to appoint a committee of its body for this purpose, prior to 3 & 4 Will. IV, c. 41, the Act by which the Judicial Committee of the Privy Council was created. It is enough to advert to this prerogative at present: the jurisdiction of the Court will be dealt with in another chapter.

§ 4. *The Colonial Governor.*

The form of appointment.

The Queen is represented in each colony by a Governor who is appointed by *commission*, and who is limited as to his powers by the *letters patent* which constitute his office, and the *instructions* which inform him in detail of the manner in which his duties are to be fulfilled. The chief executive powers of a colonial Governor are these.

Powers

He may pardon or respite criminals convicted in colonial courts, or even by a court martial after consulting the officer in command; and he may remit fines and penalties due to the Crown.

He issues warrants for the expenditure of public money.

He convokes and prorogues legislative assemblies, ordering the issue of writs for the summons of those that are elected, and dissolves those that are liable to dissolution.

His assent is necessary to Bills passed by colonial legislatures.

in Crown colonies,

He initiates legislation in colonies which do not possess elected legislatures: in colonies which do possess such legislatures, especially in those which enjoy responsible government, a message from him is usually necessary to any proposal for the expenditure of public money.

In colonies which do not possess responsible government

¹ *Campbell v. Hall*, 20 State Trials, p. 329.

he appoints to vacant offices, absolutely, or provisionally on the approval of the Crown according to the tenor of his letters patent or instructions, or the terms of local law, and can suspend or dismiss the holders of office subject to regulations. In colonies which do possess responsible government he can appoint or dismiss all public servants who hold at pleasure, and can appoint to all public offices, but in this he acts with the advice of his Council.

In the self-governing colonies the powers of the Governor are nominally wider than in the Crown colonies, where the duties of the Governor are precisely set forth in his instructions. But within the range of those instructions the Governor of a Crown colony acts with independence. He is given certain limited powers to use at his discretion.

in self-governing colonies.

The Governor of a self-governing colony is a constitutional king; his discretion must be that of his responsible advisers; he may endeavour to influence them, but he must not act contrary to their final decision, unless he is prepared to appeal from them to the colonial Parliament and ultimately to the colonial electorate.

An illustration of this principle was afforded in New Zealand in 1892. A Prime Minister with a large majority in the elected chamber had so few supporters in the nominated second chamber that he not only could not carry his measures, he could hardly obtain a discussion for them. There was no limit to the numbers of the upper chamber, and the Ministry asked the Governor to create a sufficient number of additional members to give them a majority. The Governor refused to create the full number for which his Ministers asked, on the ground that the existing state of parties was abnormal, and that the satisfaction of the demand would permanently alter the political character of the second chamber. On reference to the Colonial Office, however, he was instructed that, where no Imperial interests were concerned, and where there was no reason for doubting that the constituencies were of one mind with the Ministry, he must follow the advice of his

responsible Ministers¹. Our self-governing colonies have come into a heritage of constitutional government which they have not earned; and like the children of a man who has painfully acquired a great fortune they would spend without self-restraint. They wish to enjoy their liberties and are impatient of conventions. Yet in government, as in daily life, the observance of conventions is apt to smooth the path.

Legal
liability,

The legal liability of a colonial Governor throws some light on the character of his office.

He can be sued in the Courts of the colony in the ordinary forms of procedure. Whether the cause of action spring from liabilities incurred by him in his private or in his public capacity, this rule would appear to hold good. Though he represents the Crown, he has none of the legal irresponsibility of the Sovereign within the compass of his delegated and limited sovereignty².

for acts
done as
Governor,

More important are the questions which arise from time to time as to the limits of his liability civil or criminal, whether in the colonial Courts or in the Courts of this country, for acts done in his capacity of Governor.

The first question to be answered is whether apart from his position of Governor *any* liability has arisen: this of course is a matter of general law, except in so far as the position of Governor may involve greater responsibility, and consequently justify more prompt measures for the repression of violence or disorder likely to lead to violence³.

But assuming that a liability has been shown to exist, the next question to be answered is whether the acts complained of were done by the Governor of the colony *as Governor*; this

¹ House of Commons Papers, 198 of 1893, p. 48. Compare this with the refusal of a similar request in New South Wales under different conditions. See Times Newspaper, Sept. 14, 1894.

² *Hill v. Bigge*, 3 Moore P. C. 465. *Musgrave v. Pulido*, 5 App. Ca. 102. The Colonial Governor differs herein from the Lord-Lieutenant of Ireland, against whom no action can be maintained in Ireland while Viceroy of that kingdom, for acts done in his official capacity. *Sullivan v. Spencer*, v. Irish Rep. C. L. 177.

³ *Phillips v. Eyre*, L. R., 6 Q. B. pp. 15, 16.

is matter of fact; a further question follows, if so done were they *acts of state*, that is, acts covered by the powers assigned to the Governor. It is not enough that the acts shall be such as the Queen, through her ministers, might lawfully do; it must be ascertained by reference to the letters patent and instructions with which the Governor of a Crown colony is furnished, or to the executive powers conferred by imperial or colonial law upon a Governor in a self-governing colony, whether the acts done are justified by the powers conferred¹. If they are the Governor is protected; he is a servant of the Crown, doing that which the Queen might do by her servants, and has commissioned him to do if required. If the acts done are outside the powers conferred, the fact that the Governor assumed to do them *as Governor*, will not protect him from their legal consequences².

depends
on his
legal
powers,

not on his
position as
Governor.

It might be interesting to speculate on the legal position of the Governor of Victoria, if on the advice of his responsible ministers he gave an order which the law would not support, and was sued by a person injured thereby. He does not seem to possess the legal irresponsibility of the Sovereign. Presumably he would refuse to act on the advice of his ministers unless the action recommended was so obviously desirable, and his ministers so clearly acting with the good will of the community, that they were certain to ensure the passing of an Act of Indemnity.

¹ *Cameron v. Kyle*, 3 Knapp, 332.

² *Musgrave v. Poldo*, 5 App. Ca. 111. 'Let it be granted that, for acts of power done by a Governor *under and within the limits of his commission*, he is protected, because in doing them he is a servant of the Crown, and is exercising its sovereign authority: the like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the Governor may assume to do them *as Governor*, cannot be considered as done on behalf of the Crown, nor to be in any proper sense acts of State.'

It must be understood that 'acts of State' as between sovereign and subject must be acts such as the sovereign can lawfully do. If one should allege of an act complained of that, though unlawful in itself, it is a matter of State policy or necessity, the answer is, in the words of Lord Camden, that 'the common law does not understand that kind of reasoning.' *Entick v. Carrington*, State Trials, 19, p. 1030.

SECTION IV.

INDIA.

§ 1. *The Empress of India.*

The long history of the East India Company and its relations with the Crown and Parliament can have no place here. Students of that history will know or learn how a trading company with a temporary charter grew into a territorial sovereign, subordinate to the English Crown and Parliament¹, and how the hold of the State upon its action became closer and closer as the charters were from time to time renewed, till after the Indian Mutiny the dual control of India was brought to an end and the government of India assigned to the Crown. The Queen of the United Kingdom of Great Britain and Ireland is Empress of India².

The
character
of Indian
govern-
ment.

This title suggests what is the case, that the Government of India does not follow the lines either of the Home or of any of the colonial Governments. Apart from the legislative supremacy of Parliament, which is the same for all parts of the Queen's dominions, the colonies are governed by the Queen in Council, or by the Queen acting on the advice of the Secretary of State for the Colonies. But India is governed by the Empress of India acting on the advice of the Secretary of State for India; and where the advice of a Council comes in it is not the Privy Council, but the *Council of India*. The relations of the Secretary of State to the Council, and of the two to the Viceroy and *his* Councils,

¹ See the preamble to 53 Geo. III, c. 155, where territories of the Company are described as '*subject to the undoubted sovereignty of the Crown.*'

² 39 Vict. c. 10 recites (1) the Act of Union with Ireland which empowered the King to assume such title as he thought fit by proclamation under the Great Seal, (2) the assumption of the title of King 'of the United Kingdom of Great Britain and Ireland,' (3) the Act of 1858 and the vesting of Indian Government in the Crown, and proceeds to empower the Queen by proclamation under the Great Seal 'to make such addition to the style and titles at present appertaining to the Imperial Crown of the United Kingdom and its dependencies as to Her Majesty may seem meet.' The title of Empress of India was shortly after assumed by Her Majesty.

form a branch of the constitutional fabric which seems to stand apart from the rest.

The Secretary of State for India is responsible to the Crown and to Parliament for the exercise of the royal prerogative in the government of India. The government of India is regulated—as regards the central executive by the Act for the better government of India, 21 & 22 Vict. c. 106—as regards the local executive by the Indian Councils Acts of 1861 and 1892. The Queen appoints the great officers in India, the Governor-General, the Governors of Madras and Bombay, their Councils, and the Judges of the Higher Courts, by warrant under the sign manual. The central and local executive.

Very important business of a political character, in relation to Native States, may be transacted on the sole responsibility of the Secretary of State, who must use his discretion as to the propriety of bringing these matters before the Prime Minister and the Cabinet.

§ 2. *The India Office.*

(a) *The Secretary of State and his Council.*

The Secretary of State appoints the members of the Council of India: they are not appointed by the Queen on his recommendation, nor is he required to make the appointment in Council¹. The number of the Council is fifteen, of whom nine must have served or resided in India for ten years within ten years of their appointment. The Secretary of State may, if he pleases, forbear to fill vacancies on the Council so long as the numbers are not less than ten². They hold office for ten years, subject to the conditions of good behaviour, and liability to removal by address of both Houses of Parliament. But three may be appointed, subject to these conditions, for life, or a member may be continued for five years at the expiration of his ten years' service. The Council. Mode of appointment. Number. The Tenure.

¹ See as to appointment and conditions of tenure of members of the Council, 21 & 22 Vict. c. 106, s. 10; 32 & 33 Vict. c. 97, s. 1; 39 Vict. c. 7, s. 1.

² 52 & 53 Vict. c. 65.

reasons for such last-mentioned appointments, or continuations of appointments, must be laid before Parliament.

Transaction of business.

The Council must meet at least once a week; but the Secretary of State may summon it when and as often as he pleases¹. Every order or communication proposed to be sent to India, and every order made in the United Kingdom under the Act which provides for the better government of India, must either be brought before the Council at a meeting, or laid on its table for seven days for perusal. If a majority of the Council should differ from the Secretary of State, he may, except in cases where a majority is expressly required, overrule his Council. In such a case he must record his reasons for dissent. The general requirement of submission to the Council, before action is taken, of all communications with India is subject to exception in the case of *secret* or *urgent* orders.

Secret orders are such as relate to making war or peace, or entering into treaty or negotiation with a native or other State.

Urgent orders seem to be matters in which it is important that the Secretary of State should act at once: and these he must, after acting, communicate to the Council, together with the reasons for urgency.

(b) *The Secretary of State in Council.*

So far we have considered the powers of the Secretary of State exercising the prerogatives of the Crown with the assistance of a Council. But there are certain acts which must be done by him *in* Council, and certain matters in which he can only act with a majority of his Council.

Things to be done in Council.

Laws made by the Indian Government, or by the Governments of Madras and Bombay, come into force when they have received the assent of the Governor-General, but the

¹ The Secretary of State can divide the Council into Committees for the convenient transaction of business. To one of these, the Political Committee, it is usual to communicate *secret* orders.

Queen may disallow them, as in the case of a colonial law. Such disallowance is signified to the Government of India by the Secretary of State *in Council*. Again, if the Indian Government desires by proclamations to alter provincial boundaries or to create a provincial Council, the previous sanction of the Queen is communicated by the Secretary of State *in Council*. Again, the Secretary of State must do certain things *in Council*, although the Council cannot control his *discretion*: such are appointments, promotions or removals in the establishment of the India Office, or the making of regulations for the admission of candidates to the Indian Civil Service.

Again, there are certain matters in which he cannot act without a majority of the Council. Here he must act not only *in Council* but *with Council*. He cannot otherwise grant or appropriate any part of the Indian revenues; or borrow money in Great Britain upon the security of the Indian revenues; or buy, sell or mortgage real or personal property; or regulate official patronage in India; or restore an officer whom the Indian authorities have removed or suspended.

Things to
be done
with
Council.

(c) *Parliamentary Control.*

In certain matters the action of the Secretary of State and the Council is not valid unless it is sanctioned by Parliament¹. This sanction may need to be expressed directly, as when the revenues of India are applied to pay for military operations beyond the Indian frontier, or impliedly, as where notice of a commencement of hostilities, of the reappointment of a member of the Council, or of proposed regulations for the admission of candidates to the Indian Civil Service, are required to be laid before Parliament for or within a certain time.

Things to
be sanc-
tioned by
Parlia-
ment.

When a change is proposed in the numbers or salaries of the establishment of the India Office, such change must be made by order of the Queen in Council (not the Council of India), and the order must be laid before Parliament within

¹ 21 & 22 Vict. c. 106, ss. 15, 32, 54, 56; 39 Vict. c. 7, s. 1.

fourteen days of its making or of the next meeting of Parliament.

§ 3. *The Indian Government.*

The Queen appoints by warrant under the sign manual the Governor-General of India, the Governors of the Presidencies of Madras, or Fort St. George, and of Bombay, the members of their respective Councils, the Judges of the High Courts of Calcutta, Madras, Bombay, and the North-West Provinces. All Indian appointments, unless otherwise provided for, are vested in the Queen, acting on the advice of the Secretary of State.

The
Governor-
General in
Council
for
executive
purposes.

The local government of India, if one may use such a term of so august a body as the Governor-General in Council, is constituted on the lines of a Crown colony. The Governor-General is assisted by an executive Council appointed by the Crown. In this Council he has, like the Secretary of State in the Home Council, a single vote, and a casting vote, but like the Secretary of State he can overrule the decision of his Council, and must then record the grounds of his action. He can make war and peace; but an order to commence hostilities must be made known to Parliament within three months, if it be sitting, or if it be not sitting, within a month of its next Session. He may in Council constitute new provinces, appoint a Lieutenant-Governor to a province so constituted, and define his authority, and he may alter the boundaries of existing provinces. This he does by proclamation, but no such proclamation is of force until the sanction of the Queen is communicated to the Governor-General by the Secretary of State. The Governor-General must take the orders of the Secretary of State¹, and facilities of communication, through the telegraph and in other ways, have diminished the power of initiative which his presence on the scene of action formerly gave him.

Indian legislation is effected by the Governor-General in Council², and the Council for this purpose is increased by

¹ 21 & 22 Vict. c. 106, s. 3.

² 24 & 25 Vict. c. 67, s. 10.

a number of persons, not less than six nor more than twelve, appointed by the Governor-General¹. No legislative measure may be introduced without the leave of the Council: and on the introduction of certain sorts of measures the Governor-General has a veto². He may refuse his assent to a law passed by the majority of the Council or may reserve it, and so suspend its operation until the Queen has signified her assent. If he assents the law takes effect, unless and until it is disallowed by the Home Government. The Government of the Presidencies is similar in character to the Government of the Indian Empire.

The Governor of each Presidency has a Council for executive and a larger Council for legislative purposes. But his legislation is subject not only to the Royal veto, but also to the veto of the Governor-General. Nor can his Council initiate without the consent of the Governor-General any of the matters which the Governor-General may forbid to be introduced to his own Council, nor in addition, matters affecting (1) communication by post or telegraph, (2) coinage, (3) the penal code, (4) patent or copyright.

The Presidencies.

SECTION V.

Miscellaneous Possessions, Dependencies and Protectorates.

§ 1. *Miscellaneous Possessions.*

Under this heading must be placed some possessions of the Crown which do not fall into either of the preceding sections. The Peninsula of Aden and the Island of Perim, adjacent to Aden.

¹ The Indian Councils Act, 55 & 56 Vict. c. 14, gives power to increase the number of members of the Council of the Governor-General and of those of Madras and Bombay.

² The measures affected by the Governor-General's veto are :

- (1) Measures affecting :—the public debt or charging the revenues of India ;
- (2) the religion or rights and usages of Her Majesty's subjects in India ;
- (3) the discipline of naval or military forces ;
- (4) the relations with foreign Princes or States.

it at the mouth of the Red Sea, are governed from Bombay, and in strictness form a part of British India. So too does the Island of Socotra, about 300 miles to the south-east of

Ascension. Aden. The Island of Ascension in the South Atlantic, with a population of about 166, is under the supervision of the Lords of the Admiralty; so, too, would seem to be the little settlement of Tristan d'Acunha, with its population of eighty-four, where 'the inhabitants practically enjoy their goods in common, and there is no strong drink on the island and no crime.' Some small islands in the Indian Ocean, and the

Islands. Island of Sombbrero in the West Indies, are used for light-houses maintained by the Board of Trade¹; others in the Pacific are leased by the High Commissioner for the Western Pacific after consultation with the Treasury².

Cyprus. Cyprus is occupied and administered by England. It is not part of the dominions of the Crown: the property is in Turkey, though England has compulsory powers to purchase land for public purposes. The revenue, so far as it exceeds the expenditure, is also handed over to Turkey, and our interest in the island is always determinable upon the restoration by Russia to Turkey of certain Asiatic conquests.

But Cyprus under our occupation has a constitution under a High Commissioner, who is virtually a Colonial Governor acting under the Colonial Office, an executive and legislative Council, the latter being partly elected, and a gradation of civil and criminal Courts³.

§ 2. *Dependent States. Protectorates and Spheres of Influence.*

These relations differ in character: the dependent or protected states may stand in varying degrees of dependence upon the government of this country.

The right to control the foreign relations of a state is the beginning of a protectorate, and carries with it a greater

¹ Colonial Office List, 1895, p. 295. ² Ibid., Tit. Miscellaneous Islands.

³ Colonial Office List, p. 275. And see Colonial Executive, Representative Assemblies and Electorates, Commons Papers, 1889 [70], p. 59.

degree of responsibility than our governments have always been ready to recognize. If we interpose between the protected state and foreign powers, we make ourselves ultimately responsible for the security of the subjects of those powers while within the jurisdiction of the protected state: yet in the case of states with a settled constitution we seem to base such rights of jurisdiction as we possess upon the express terms of treaties, and not upon the general powers which the fact of protection and the exclusion of foreign influence would seem to confer¹.

There are in India, dependent on the Imperial Government, India. about 800 native states varying almost infinitely in size, population and importance, covering about 600,000 square miles, with a population of fifty-five millions. The degrees of dependence vary, but in all alike we find that the British Government controls the external or foreign relations, makes itself generally responsible for the internal peace and good order of the native state, and specially responsible for the safety of British subjects resident therein, and further requires the native state to assist in repelling attacks from abroad, and in maintaining order at home.

The control thus laid on the action of these dependent states is exercised through a British Resident appointed for this purpose by the Governor-General. A group of dependencies similar in character has grown up about the Straits Settlements, where the small native states admit a British Resident to administer or advise in the administration of their affairs. The Straits Settlements.

The Transvaal, again, is a state which is, so far as its internal affairs go, an independent political society. Its foreign relations are subject to our approval. The Transvaal.

The relations of the dependent state with the government of this country are necessarily affected by the interest which other countries may have in those relations. The dependent states of India and the Malay Peninsula are of little concern

¹ Hall, Foreign Jurisdiction of the British Crown, Part iii. ch. 3.

to any but British residents. The Transvaal is a centre of commercial speculation in which many countries are interested. Hence the influence of this country, whether direct as by treaty, or indirect from the existence of British interests, is combated by rival influences.

But I do not desire to do more than call attention to the existence of these dependencies: they affect the external relations of the Empire, not the constitution of this country.

Pro-
tectorates.

The territories which remain to be dealt with are Protectorates and Spheres of Influence, regulated by High Commissioners representing the Crown, or by companies exercising powers conferred upon them by charter, and from time to time extended by Order in Council.

The High Commission over the Pacific Islands, held by the Governor of Fiji, and the High Commission for South Africa, vested in the Governor of the Cape Colony, enable the Crown to control the affairs of the territories within the terms of the commission by Order in Council, issued from time to time.

Generally speaking, the African Protectorates, which grow out of or are adjacent to Colonies, are under the supervision of the Colonial Office. The Niger Protectorate, the Zanzibar Protectorate, British East Africa, and British Central Africa *north* of the Zambesi, are under the Foreign Office.

The Niger Protectorate and territories, those of North Borneo and Sarawak, and the territories of the British East Africa Company, are instances of Chartered Companies ruling under the immediate control of the government at home. The African territories south of the Zambesi are under the High Commissioner, but their administration has been to a large extent entrusted to the South African Chartered Company.

The charters of these companies enable them to acquire territory, to make ordinances and to exercise jurisdiction, subject to the approval and continuous supervision of the Secretary of State. A good illustration of the practical

working of this process is to be seen in the charter of the South African Company¹, and the Matabeleland Order in Council of 1894². The charter incorporates the company and confers upon it powers of the nature described above. The Order in Council brings a territory within the limits of these general powers, prescribes definite rules for their exercise, and enables the Secretary of State from time to time to declare that any parts of South Africa south of the Zambesi river, and *under the protection* of Her Majesty, shall be included in the limits of the Order.

A sphere of influence would seem to mean an area wherein foreign powers undertake not to attempt to acquire influence or territory by treaty or annexation. Such a mode of dealing is illustrated by the seventh Article of the Anglo-German Agreement of 1890.

The two powers engage that neither will interfere with any sphere of influence assigned to the other by Articles 1 to 4. One power will not in the sphere of the other make acquisitions, conclude treaties, accept sovereign rights or protectorates, or hinder the extension of influence of the other.

It is understood that no companies nor individuals subject to one power can exercise sovereign rights in a sphere assigned to the other, except with the assent of the latter.

Since this treaty was made the Queen has by Order in Council placed the South African sphere of influence under the government of the High Commissioner for South African affairs³. Without formal annexation of territory such government must needs be implied in the words of the Order.

In the exercise of the powers and authorities hereby conferred upon him, the High Commissioner may among other things from

¹ London Gazette, Dec. 20, 1889.

² July 18, 1894.

³ Order in Council, May 9, 1891. The Order recites the fact that the territories dealt with are under the protection of Her Majesty, that she has power and jurisdiction in the same by treaty, grant, usage, sufferance and other lawful means, and alleges itself to be made by virtue and in exercise of the powers by the Foreign Jurisdiction Act or otherwise in Her Majesty vested. But the Order goes a long way beyond any powers conferred by the Foreign Jurisdiction Act.

time to time by proclamation provide for the administration of justice, the raising of revenue, and generally for the peace, order, and good government of all persons within the limits of this Order, including the prohibition and punishment of all acts tending to disturb the public peace.

Objects of
Proteo-
torates.

The Protectorates or spheres of influence, as distinguished from the dependent native states adjacent to British India or the Straits Settlements, would seem to exist not so much for the better defence of our own frontiers as for the acquisition of a fresh field for commercial enterprise or settlement. Such would certainly seem to be the case in Africa and North Borneo. The High Commission over the Pacific Islands vested in the Governor of Fiji exists for a different purpose, mainly for the protection of the islanders from being kidnapped and carried into slavery, and secondly for the provision of a jurisdiction to punish crimes committed by British subjects on these islands and to settle disputes between British subjects living there.

CHAPTER VI.

THE CROWN AND FOREIGN RELATIONS.

FOR external purposes the Crown represents the community. Representative character of the Crown. No person or body save the Queen, by her ministers or her accredited representatives, can deal with a foreign state so as to acquire rights or incur liabilities on behalf of the community at large.

The prerogative of the Crown in this respect is exercised, subject always to the collective advice of the Cabinet, through one of Her Majesty's Principal Secretaries of State, to whom is entrusted the business of communicating with the representatives of foreign states in this country, and with our own representatives in other communities.

§ 1. *The Foreign Office.*

The Secretary of State for Foreign Affairs is assisted by The staff of the Foreign Office. two Under Secretaries of State, one of whom is political, the other permanent; two assistant Under Secretaries, a Librarian, a head of the Treaty Department, and a staff of clerks¹. The chief business of the Secretary of State, besides formal duties such as the presentation of the representatives of other powers to the Queen, consists in receiving and answering communications from individuals, from other departments of government, from our own diplomatic agents abroad, and from those of other states, and in determining the policy of this country towards others.

¹ Foreign Office Guide, 4, 5.

Its procedure.

His relation to the Crown and to his colleagues in the transaction of his business, is best described in the evidence given by Mr. Hammond, then permanent Under Secretary, before a Parliamentary Committee in 1861¹.

When letters or despatches arrive they are sent by one of the clerks to one of the Under Secretaries, he reads and sends them on to the Secretary of State, who reads them, gives instructions, and returns them. The Under Secretary having studied the instructions, sends the papers to the clerk into whose department they fall, who registers them and carries them out.

But important despatches and correspondence with our Ministers abroad do not end here. The despatches and if necessary the drafts of answers are sent, first to the permanent Under Secretary, then to the Prime Minister, then to the Queen, and, as we have seen, Her Majesty desires always to have time to form an opinion upon important despatches before they are sent; lastly, they are circulated among the members of the Cabinet.

Ante,
pp. 41,
135.

§ 2. *Diplomatic Agents and Consuls.*

But it is obvious that important and pressing matters cannot be dealt with wholly by correspondence. So in all foreign civilized states of any importance the interests of this country are superintended by two classes of agents resident on the spot: diplomatic agents and consuls.

Diplomatic
agents.

A diplomatic agent may, in point of dignity, be an ambassador or merely a *chargé d'affaires*. He may be permanently accredited to the Court of a foreign country, or he may be despatched on a special mission: but in all cases he represents the state from which he is sent.

One state may refuse to receive or retain the diplomatic agent of another, either because it desires to break off all friendly relations and enter upon a state of war, or because

¹ Report of Committee on Diplomatic Service, Parliamentary Papers, 1861, vol. vi. p. 75.

the individual agent is personally disagreeable, or politically hostile to it, or because his reception would amount to an admission of claims which it does not recognize, as in the case of the Papal legates of days before the English Reformation.

A discussion on the powers and duties of diplomatic agents is not proper to this work. The forms of their appointment vary. Ambassadors and envoys plenipotentiary receive powers to treat and negotiate under the Great Seal, and also a letter of credence under the sign manual to the Sovereign or President of the country to which they are sent. A *chargé d'affaires* has no such ample powers, and his letter of credence is signed by the Secretary of State ^{Forms of appointment.} ^{1.}

Persons thus accredited either by the Queen of this country to other states, or by other states to the Queen, enjoy certain immunities from the law of the land in which they reside. ^{Immunities,}

It is sometimes said that such immunities, like the privilege of members of Parliament, rest on their necessity for the purpose of enabling those who enjoy them to discharge their duties without hindrance; but the more correct view seems to be that they rest on the representative character of the diplomatic agent. The immunities which would be due to his Sovereign are due to him. In one respect he is not merely free from, but outside of the law of the state to which he is accredited. His children born there are not subjects of that state but follow the nationality of their father ^{the reason for them.} ^{2.}

Besides this he is exempt from its criminal jurisdiction, though exceptions may be noted in which an ambassador having taken part in conspiracies against the state to which he is accredited, has been arrested and kept in custody ^{3.}

He is also exempt from its civil jurisdiction. The limits of this exemption differ in different countries; so does the authority for the exemption. In some it rests on general

¹ For forms of powers to treat and negotiate, and of letters of credence, see Appendix II.

² Hall, *International Law*, 3rd ed. § 50, p. 170.

³ *Ibid.* p. 168, and see cases there cited. *Martin, Causes Célèbres*, i. 103.

Immunities of a foreign ambassador in England.

principles of international law embodied in the common law of the land¹. In some it is based on the same principles affirmed, as such, in a civil code. In our own country the exemption is a specific piece of Statute law making no pretension to embody any general principles, but passed admittedly to prevent the recurrence of a scandal.

The Act 7 Anne, c. 12, after reciting the insults offered to 'his excellency Andrew Artemonowitz Matneof, ambassador extraordinary of his Czarish Majesty, Emperor of Russia,' who had been pulled out of his coach and detained, goes on to enact that

Statute Law.

'To prevent the like insolences for the future be it further declared by the authority aforesaid that all writs and processes that shall at any time hereafter be sued forth or prosecuted whereby the person of any ambassador or other publick minister of any foreign prince or state authorized and received as such by Her Majesty her heirs or successors, or the domestick or domestick servant of any such ambassador or other publick minister may be arrested or imprisoned or his or their goods or chattels may be distrained seized or attached shall be deemed and adjudged to be utterly null and void to all intents constructions and purposes whatever.'

General principle.

But behind this enactment lies a general principle accepted by our Courts and reaching far beyond the exemption from civil process of an ambassador and his suite.

'We are of opinion,' said Brett J., delivering the judgement of the Court of Appeal, 'that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or *over the public property of any other state* which is destined to its public use, or over the property of any ambassador, though such sovereign, property, or ambassador

¹ So I understand Mr. Hall's description of the rule laid down by the French Courts, p. 173.

be within its territory, and therefore, but for the common agreement, subject to its jurisdiction¹.

The civil immunity extends to the suite and servants of a diplomatic agent, not apparently in their own right but because of their necessity to the dignity or the duties of their master². The question of the immunity of such persons from criminal jurisdiction is not settled. In England they are held liable to the criminal law. In other countries the difficulty seems to be evaded by the readiness of the master to hand over the delinquent servant to justice³. Suite and servants.

The territorial immunities of the house of a diplomatic agent are also doubtful. Where the agent himself is liable to be arrested on the grounds stated above, the privileges of his house end with his own; where a servant or member of his suite has committed an offence against the criminal law, it would seem that in England and France it is the practice to disregard the immunity of the house for the purpose of making the arrest⁴. When the offence has been committed by a subject of the country to which the agent is accredited, it is obviously right that the law should take its course. In short, the house of a foreign minister does not appear to be, like a public ship in a foreign harbour, extra territorial, but merely exempt from jurisdiction so far as is necessary to support the dignity of the minister and to enable him properly to discharge his duties.

A consul does not represent the state in its external relations to other states, unless, as sometimes happens, he is clothed with a diplomatic character in addition to his consular functions. Otherwise he is merely employed to attend to the interests of British subjects during their stay in the country wherein he is engaged to reside. A consul,

¹ *The Parlement Belge*, 5 P. D. 197. See also *Mighell v. Sullan of Johore* (1894) 1 Q. B. C. A. 149.

² If the servant of an ambassador engage in trade he is liable under the bankruptcy laws. 7 Anne, c. 12, s. 5.

³ Hall, § 51, p. 175.

⁴ Hall, § 52, p. 176 *et seq.*

his duties, His business is to issue or affix a *visa* to passports for British subjects when needed, to authenticate documents, and births and deaths, and to take statements from captains of British ships as to injuries sustained at sea. He receives complaints of British subjects as to any injustice inflicted, and communicates with the local authorities, he administers the property of such as die in the country of his residence, and arbitrates on disputes which they may bring before him; he collects information, commercial and economical, and forwards it to the Foreign Office¹.

how far
judicial.

Apart from Statute or Order in Council requiring a consul to exercise a jurisdiction possessed by the Crown in a foreign land, the consular office has no inherent judicial power. Such as is exercised by consuls may best be dealt with under the head of foreign jurisdictions.

A consul is appointed by commission or patent from the government of the country which employs him. This needs to be confirmed by an *exequatur*, a document issued by the government of the country wherein the consul's duties are to be discharged. In England such documents are issued from the Foreign Office. The *exequatur* may be refused or withdrawn if the consul should be personally unacceptable or should misconduct himself in the exercise of his office.

Consular
immu-
nities.

The immunities of a consul are of somewhat uncertain extent. Practically he is entitled to have his archives and other official documents treated as inviolable, and to be exempt from such personal liabilities (such as serving on juries or in the militia) as would interfere with the continuous discharge of his duties.

§ 3. *War, Peace and Treaties.*

The pre-
rogative of
making
war:

The Queen, acting on the advice of her Ministers, makes war and peace. The House of Commons may refuse supplies for a war, or either House may express its disapproval

¹ For a fuller account of consular duties, see Hall, *International Law*, § 105, pp. 314-321, and *Foreign Jurisdiction of the Crown*, p. 16.

by resolutions condemnatory of the ministerial policy, or by address to the Crown, or by making the position of the ministry in other ways untenable: but Parliament has no direct means either of bringing about a war or of bringing a war to an end.

Nor does a decided expression of opinion by the House of Commons always overbear the policy of a ministry. In 1782 a resolution of the House of Commons, followed by an address to the Crown, caused Lord North to take steps to end the war with the American colonies¹; but in 1857 a resolution of the House, condemnatory of the war with China, caused Lord Palmerston to appeal to the country, with the result that a majority of his supporters were returned at a general election.

The prerogative of the Crown in making peace is so much involved in questions as to the prerogative in making treaties that the two must be dealt with together. Parliament has only indirect means of bringing a war to a close, but it is hard to conceive of a peace concluded simply by a cessation of hostilities and mutual assurances of amity. Some engagements must be entered into or territory ceded, and a question arises in this form: No one but the Crown can bind the community by treaty, but can the Crown invariably do so without the co-operation of Parliament?

This much appears to be certain; that where a treaty involves either a charge on the people or a change in the law of the land it may be made, but cannot be carried into effect, without the sanction of Parliament. Such treaties are therefore made subject to the approval of Parliament and are submitted for its approval before ratification, or ratified under condition.

Such are treaties of commerce which might require a change in the character or the amount of duties charged on exported or imported goods: or extradition treaties which confer on the executive a power to seize, take up and hand over to

¹ Cobbett, Parl. Hist. xxii. pp. 1084, 1214.

Changes
in law.

a foreign state, persons who have committed crime there and taken refuge here¹.

Grant of
immu-
nities.

The question whether the Crown can, by treaty merely, extend to foreigners immunities from the law of the land, which would affect the private rights of citizens, was raised in the case of the *Parlement Belge*².

It was alleged in that case that the Queen had by convention with the King of the Belgians, conferred upon a ship, assumed by the Court to be a private ship engaged in trade, the immunities of a public ship, or ship of war, so as to disentitle a British subject from proceeding against her for injuries sustained in a collision. Sir Robert Phillimore held that the treaty-making prerogative did not extend this length, and gave judgement against the ship. His decision was reversed by the Court of Appeal, but on a different ground, namely, that the *Parlement Belge* was a public ship, although not a ship of war, being used for a national purpose, the transmission of mails. The Court carefully abstained from expressing any opinion on the point on which Sir Robert Phillimore mainly rested his judgement.

The same question was raised, and evaded, in *Walker v. Baird*³. The working of a lobster-factory on the coast of Newfoundland was stopped by an officer entrusted with the enforcement of an agreement made between the Queen and the Government of France. The owner of the factory brought an action, and it was held to be no defence to allege that the conduct of the officer was 'an act of state.' Whether or no it could be justified by the treaty-making power of the Crown was discussed but not settled, inasmuch as the statement of defence assumed that the mere allegation that the acts were done in pursuance of a treaty took the matter out of the cognizance of the Court. This was not the view of the Judicial Committee.

It was admitted that the Crown 'could not sanction an invasion

¹ Forsyth, *Cases and Opinions in Constitutional Law*, 369.

² L. R. 4 P. D. 154-5.

³ [1892] A. C. 491.

by its officers of the rights of private individuals whenever it was necessary in order to compel obedience to the terms of a treaty.'

'Whether the power contended for does exist in the case of treaties of peace, and whether if so it exists equally in the case of treaties akin to a treaty of peace, or whether in both or either of these cases interference with private rights can be authorized otherwise than by the legislature, are grave questions upon which their Lordships do not find it necessary to express an opinion.'

The extent of the royal prerogative as regards the cession of territory has been discussed with vehemence of late, and left unsettled. Various limitations have been alleged. It is said that the Queen may cede territories acquired by conquest, or Crown colonies, but not other territory, that she may not cede territory in respect of which Parliament has legislated, that her powers of cession at the end of a war are different from and larger than her powers in time of peace. But this much is clear, that there is no authority beyond *dicta* of lawyers, expressed in Parliamentary debate or otherwise, for any such limitation on the powers of the Crown as has been alleged. Cession of territory.

In 1876 a case came before the Judicial Committee of the Privy Council in which the High Court of Bombay had held, for the purposes of its judgement, that territory had been ceded and that the Crown had no power to make such cession in time of peace without consent of Parliament. The Judicial Committee reversed the judgement of the Indian Court, holding that what had taken place did not amount to a cession, but their Lordships expressly stated that they entertained grave doubts 'as to the soundness of the general abstract doctrine laid down ¹.' Case of Damodhar Gordhan.

In 1890 the Queen in concluding a treaty with the Emperor of Germany, which provided among other things for the cession of Heligoland to the Emperor ², was advised by her Ministers to make the cession conditional on the approval of Parliament. This invitation to Parliament to share in the Case of Heligoland.

¹ *Damodhar Gordhan v. Deoram Kangi*, 1 App. Ca. 352.

² 53 & 54 Vict. c. 32.

exercise of the prerogative rights of the Crown, and therewith to assume the responsibilities of the Executive, was much criticised in debate. The state of the question was most fully and clearly put by Mr. Gladstone:—

‘There is one thing which I think is still higher than the *dicta* of legal authorities, in this important question, and it is our long, uniform and unbroken course of practice. It is one thing to stand upon the opinion of an ingenious or even a learned man: it is another thing to cite the authority of an entire State, signified in practical conclusions, after debate and discussion in every possible form, all bearing in one direction, and stamped with one and the same character. It is hardly possible, I believe, to conceive any kind of territory—colonies acquired by conquest, colonies acquired by settlement, with representative institutions or without representative institutions—it is not possible to point out any class of territory where you cannot show cases of cession by the Crown without the authority of Parliament.’

The precedent is an unfortunate one. Either House of Parliament can always signify its disapprobation of a treaty, and a ministry can always, if strong enough, procure a vote expressive of approval. But to make the ratification of a treaty depend upon the goodwill of a popular assembly seems to be an abnegation on the part of the Executive of a responsibility which Ministers ought to be ready to assume on behalf of the Crown.

§ 4. *Foreign Jurisdiction.*

Foreign
jurisdiction.

The Queen has power ‘by treaty, capitulation, grant, usage, sufferance, and other lawful means,’ to exercise jurisdiction within divers foreign countries.

The
Levant
Company.

The history of foreign jurisdiction of this nature begins with the Levant Company, which obtained a charter in 1581, renewed in 1606 and 1662, conferring power to appoint consuls who should administer justice between merchants ‘in all places in the dominion of the Grand Seignior, and in other places in the Levant Seas.’ By capitulations made with the

¹ Hansard, cccxvii. p. 764.

Ottoman Porte suits between subjects of the Crown were, throughout the territories specified in the charter, to be decided by the judges therein described, and not by the local Courts.

Usage appears to have extended this jurisdiction from cases in which both parties were British subjects, to cases in which the defendant only was a British subject, and to cases of crimes committed by British subjects.

When the Levant Company ceased to exist it became necessary to provide for the exercise of this jurisdiction otherwise than by the Company's charter, and perhaps also some doubts had arisen as to the power of the Crown to create such jurisdictions by mere exercise of the prerogative¹. In 1843 began the series of Foreign Jurisdiction Acts, which are now consolidated in the Act of 1890 (53 & 54 Vict. c. 37). The purport of these Acts has been to give to the Crown full power to provide by Order in Council for the exercise of such jurisdictions, wherever 'by treaty, capitulation, grant, usage, sufferance, and other lawful means,' they have been acquired or have come into existence².

Foreign jurisdictions exercised in consular courts exist at the present time (1) in civilized independent states by virtue of express treaty, as in Turkey, Persia, China, and Japan; (2) in protected states with a settled form of government, as in the protected African communities, where the relation of suzerain and dependent state involves such a jurisdiction³; (3) in countries with no settled form of government, as in the African spheres of influence, or in the Pacific islands.

¹ Hall, Foreign Jurisdiction of the British Crown, p. 9.

² For an account of the history of consular jurisdiction, and of the law (Statutes, Orders in Council, and decided cases) down to 1887, see Tarring, Consular Jurisdiction in the East. For the most recent statement of the law, see Hall, Foreign Jurisdiction of the British Crown, part iii.

³ The jurisdictions exercised in the dependent Indian states do not originate in treaty, but in the relation of suzerain and dependent state; they are the concern of the India Office, and not of the Foreign Office, and however analogous they may be to the matter in the text they are not 'foreign' or consular jurisdictions.

Where such a jurisdiction takes its origin from treaty, its extent and the persons over whom it may be exercised must be the matter of express agreement. In the other cases, the exercise of jurisdiction over others than the Queen's subjects must be a question of international law, which I do not propose to discuss¹.

Process
of their
creation.

It is enough here to call attention to these foreign, or consular jurisdictions, and to point out the three stages by which they come into being :—

(1) The treaty or rule of international law which renders their existence possible ;

(2) The Statute which gives and defines the power by which the Queen creates them ;

(3) The Order in Council by which they are in fact created, and their extent prescribed as to the law to be administered and the persons who are to be subject to it.

¹ The subject of Foreign Jurisdiction is treated exhaustively by Mr. Hall, *Foreign Jurisdiction of the British Crown*.

CHAPTER VII.

THE REVENUES OF THE CROWN AND THEIR EXPENDITURE.

SECTION I.

THE REVENUE¹.

THE revenues of the Crown are not, as the term would seem to imply, an income which the Queen receives to spend at her pleasure. Here as elsewhere in our Constitution the identification of the Crown with the State has produced a misleading terminology. The so-called revenues of the Crown are for the most part the sums paid, in various forms, by the people for the maintenance or promotion of the various objects for which Government exists. The ancient hereditary revenues of the Crown are thrown into the common stock for this purpose. Out of this common stock a sum bearing a very small proportion to the whole, £60,000 out of about £95,000,000 is assigned to the Queen to be used at her discretion. The rest goes to satisfy those national objects which cannot be satisfied except by money payments, and is appropriated precisely to these several objects by Parliament, annually, or once for all.

The arrangement of the great branches of the revenue in the annual statement of national income and expenditure furnished to Parliament affords the outline which I must

Sources of
Revenue.

¹ The authorities for this section, apart from the Statute Book, are Dr. Stubbs' Constitutional History, Mr. Dowell's History of Taxation, and the Report on Public Income and Expenditure of 1869 [366].

follow in the earlier part of this chapter. The taxes are not arranged in their historical order, nor, in the case of the Excise and Stamp duties, do the terms explain the nature of the taxation involved. But the order and the terms constitute the authorized version, and it is safer to adopt them as they stand.

The sources of revenue are thus arranged (I append the figures for the year ending March 31, 1895):—

1. Customs	£20,115,000
2. Excise	26,050,000
3. Stamps	14,440,000
4. Land-tax and House-duty	2,450,000
5. Property and Income-tax	15,600,000
6. Post Office	10,760,000
7. Telegraph Service	2,580,000
8. Crown Lands	410,000
9. Miscellaneous ¹	2,278,762

Some of these sources of revenue have a long and interesting history; some are modern. The Customs and the taxes on land and property are associated, though not in their present form, with the great constitutional struggles of the fourteenth and seventeenth centuries. The Crown lands take us back to Saxon times. The Excise and the Post Office mark the beginning of a new financial system under Charles II. The Stamp duties are a product of modern ingenuity. But I will take the taxes in the order in which they are presented to Parliament, and describe so much of the nature of each, and of its history, as may seem important to be set forth.

§ 1. *The Customs.*

Origin of
customs.

The liability of imported articles to a charge levied by the King is of very ancient date. This charge seems, in its origin, to have been a re-payment to the King for cost incurred in maintaining the ports and keeping the sea clear of pirates.

¹ Under this head is included the interest on the Suez Canal Shares and Sardinian Loan amounting to £412,976 10s. 9d.

That it was increased in order to enrich the Crown seems plain from the words of Magna Charta wherein the King promises that he will not levy evil tolls upon merchants. The Charter. A prise or prisage upon imported wine, duties on imported woad¹, fish, and salt, and an export duty upon wool and leather, appear to have been recognized at the end of the twelfth and throughout the thirteenth century.

In 1275 there was granted to Edward I, in substitution for the indefinite 'ancient and rightful customs' of the Charter, The antiqua custuma : an export duty of half a mark or 6s. 8d. on every sack of wool, and on every 300 woolfells, and a mark on every last of leather. These duties were excepted by the King in the *Confirmatio Chartarum* from the renunciation therein made of 1297. his right to levy tolls on merchandise. They were henceforth known as the *antiqua custuma*.

The *nova custuma*, first imposed by Edward I in 1303, and confirmed after some vicissitudes in the Statute of Staples in 1353², had a different origin, and ostensibly a different incidence, since it was a charge upon foreign merchants. It was a charge of 10d. on the sack of wool and on every 300 woolfells exported by alien buyers, and of 3d. in the lb. on all goods imported. The *antiqua custuma* and the *nova custuma*, together with the Prisage and Butlerage upon wines imported by English and foreign merchants, remained a part of the hereditary revenues of the Crown until the two customs duties were absorbed in the grants of tunnage and poundage made to the Crown at the commencement of each reign. Prisage and Butlerage were excepted from the consolidation of the customs duties at the beginning of the reign of Charles II; their proceeds were granted by the Crown to subjects, and they were commuted in 1803 for annuities charged on the Consolidated Fund, and payable to the persons entitled to exact the charge at the ports of England and Wales. Prisage and Butlerage.

Tunnage and poundage was a duty on exports and imports distinguished from the above-mentioned duties by the name Tunnage and Poundage.

¹ Madox, Exchequer, xviii. § 4.² 27 Ed. III, st. 2.

Export
duty on
wool.

of Subsidy. We must be careful to distinguish the two senses in which this term is used as applied to direct, and to indirect taxation; in both it means a specific Parliamentary grant as opposed to the hereditary revenues of the Crown, but in the department of direct taxation 'subsidy' has a technical meaning to be explained hereafter. The subsidy of Tunnage and Poundage is kept apart as an item of revenue from the ancient and from the new or small customs. Throughout the greater part of the fourteenth century the King claimed the right to levy a toll upon exported wool, woolfells, or leather, over and above the customs above-mentioned, and to make separate agreements with merchants for a payment on the tun of imported wine, and the pound of imported goods. This right was never admitted by Parliament, and at last, in 1371, it seemed as though the controversy was closed.

Uncer-
tainty as
to import
duties.

The settlement as to impost on wool was embodied in a Statute whereby the King was precluded from taking more than the ancient customs without consent of Parliament. In the matter of Tunnage and Poundage, Parliament seems to have thought that it had done enough in making an express grant of 2*s.* on the tun of wine, and 6*d.* on the pound of exported and imported goods, except wool and skins. The King was not expressly precluded from raising these rates, and the door was thus left open for an arbitrary increase in the royal revenues. The advantage taken of this opening by the Tudor queens and James I is commemorated in Bate's case.

Export
and
import
duties,
1376-1660.

But from 1376 down to the re-settlement of the Revenue at the Restoration, tunnage and poundage at various rates was granted either for a term of years or for the life of the King, and what we now call by the general term customs, appears to fall under three heads.

- (1) The ancient customs, together with prisage and butlerage.
- (2) The subsidy on exported wool.
- (3) The duty at a rate fixed by Parliament on the tun of imported wine, and the pound of imported goods.

These last two Parliament was careful to keep in its hands;

the subsidy by the provisions of the Act of 1371¹, tunnage and poundage by the terminable nature of the grant. But this was an insufficient security. The Tudor queens laid fresh imposts on cloth and sweet wines without consulting Parliament; and in Mary's reign the rating of merchandise upon the value sworn to by the merchant was abandoned and the values at which goods of different sorts should be rated was set forth in a Book of Rates.

James I increased by an act of prerogative the statutory poundage upon certain articles of commerce and modified the Book of Rates after consultation with the chief merchants, and without reference to Parliament. The resistance of Bate to the payment of the added duty on currants, the decision of the Court of Exchequer in favour of the Crown, the exhaustive discussion in the House of Commons in 1610, and the final limitation of the royal prerogative in this respect by the Long Parliament, are matters with which I have dealt elsewhere².

In 1660 the customs were consolidated, and the rates at which commodities should be charged were classified in the Statute which granted this portion of the revenue to the Crown. The old distinctions of ancient and new customs, subsidies and imposts, were wiped out, and rates were classified under four heads:—

- (1) The tunnage on wine.
- (2) The poundage on imported goods.
- (3) The poundage on exported goods.
- (4) The duty on woollen cloth³.

These were granted to Charles II for life, and in like manner to James II.

New duties were imposed in the reign of William and Mary, and in 1698 an increased percentage was charged upon the articles specified in the Act of 1660, under the title of the New Subsidy. Further percentages were charged during the war of the Spanish succession in 1703 and 1704, during the war of the Austrian succession in 1749, and during the Seven

¹ 45 Ed. III, c. 4.

² Parliament, ix. § 3.

³ 12 Car. II, c. 4.

Years' war in 1769: but the export duty on woollen manufactures was repealed in 1700.

Thus our revenue laws had become extremely complex when a fresh consolidation of customs was carried into effect by Mr. Pitt in 1787¹. Hitherto the complication of the customs duties extended not only to their collection but to their expenditure: for each duty was appropriated to a specific item of expense. The Committee of Public Accounts recommended that the customs should be simplified; the entire revenue thence arising was henceforth paid into one Fund, called the Consolidated Fund.

Since 1787 new tariffs have been enacted, and new consolidation Acts passed. The principles on which our modern financial policy has in this respect been based, are mainly two: one is to simplify and cheapen the collection of the revenue by reducing the number of commodities on which duty is chargeable: the other is to encourage our manufacturing interest by the abandonment of taxes on raw material imported into this country for purposes of manufacture.

The simplification may be said to have been initiated by Sir Robert Peel. When he came into office in 1842, the customs included about 1,200 articles. In one year, 1845, he struck 450 off the list². The reduction has gone on almost to the present day; and great financial authorities begin to doubt whether we have not unduly narrowed the basis of our revenue from this source. Be this as it may, the number of duty-paying articles has shrunk from 1,200 in 1842 to about fifteen at the present time.

*

§ 2. *The Excise.*

Duties on articles of consumption produced at home were first introduced under the Commonwealth. After some murmuring at the novelty of the tax, and at its incidence upon things of daily use, it was accepted as both productive and fair. The duties at that time extended not only to articles

¹ 27 Geo. III, c. 13, s. 52.

² 8 & 9 Vict. c. 12.

produced at home, but to certain articles imported from abroad, which were thus taxed twice over, first at the ports in accordance with the Book of Rates, and again while in the hands of the merchant on their way to the consumer.

When the revenue was settled on the Restoration of Charles II, it was necessary to provide the King with a source of income which should meet the loss occasioned by the abolition of military tenures. Resettle-
ment at
the Restor-
ation.

It was impossible to devise a tax which, without unfairness to individuals, should fall upon the lands heretofore held in chivalry. A general land tax would have borne hardly on those who had not been tenants-in-chief, or tenants in chivalry: a tax limited to lands so held would not have been fair to purchasers during the Commonwealth who had bought lands which they supposed to have been for ever freed from liabilities of this nature.

An excise duty on beer and other liquors, although it did not correspond either in character or incidence to the source of revenue which was abandoned, seemed to be a just and reasonable method of raising money: it was one to which the taxpayer had become accustomed in the days of the Commonwealth. An excise duty was therefore imposed by 12 Car. II, c. 12, and was made a part of the hereditary revenues of the Crown. A duty similar in character and amount was imposed at the same time and granted to the Crown for life. The
hereditary
Excise,

When the King was no longer entrusted with the maintenance of all the services of the country, and was granted only such a sum as would suffice to maintain the Civil List, the hereditary excise with the other hereditary revenues diminished *pro tanto* the need of a supplementary grant from Parliament to make up the amount at which the annual cost of the Civil Service was estimated. At the commencement of Anne's reign, the right of the Crown to alienate its hereditary revenues was limited by the Statute which granted a Civil List to the Queen ¹.

¹ Anne, st. i. c. 7, s. 3, 7.

Com-
muted,

In 1736 a portion of this income was commuted by Parliament for an annual payment to the Crown of £70,000. In 1787 by the Consolidated Fund Act, already referred to, all existing excise duties were repealed, and therewith the hereditary excise. New duties were imposed of a similar character, and their produce carried to the Consolidated Fund, but a calculation was made every year of the amount which the hereditary excise would have produced.

Sur-
rendered,

Without going into the detail of the Statutes on the subject it is enough to say that, although each successive sovereign since George III has surrendered his hereditary revenues in consideration of a fixed annual payment, the hereditary rights of the Crown are kept alive, while provision is made that the income of which they are the subject should, as in the case of the Crown lands, go to the Consolidated Fund, or, as in the case of the hereditary excise, should not be raised at all.

Extin-
guished.

Use of
the term
Excise.

The articles on which excise duties are now levied are not numerous, but include beer and spirits which, together, produce more than a quarter of the national revenue. But I would point out some extension of the term beyond its original meaning of a tax upon articles of use or consumption produced at home.

The Excise
Bill of
Walpole.

The term was used to excite popular feeling against a very useful measure, the celebrated Excise Bill of Sir Robert Walpole. His scheme was nothing more than a mode of collecting the customs on wine and tobacco which had been already applied to tea, coffee, and cocoa. Instead of taking the whole duty upon the landing of the goods, Walpole proposed to take a small duty upon unshipment, after payment of which the goods were required to be warehoused. If they were exported thence, no further duty was demanded; if taken out for consumption at home, a sum which made up the full duty was to be paid, and this duty was to be collected by the officers of Excise. The term, which had reference solely to the mode of collection, was used by the leaders of an unscrupulous opposition as describing the character of the tax.

People were told that a multitude of Excise officers would penetrate every household and take toll of every article of use or consumption. The clamour raised determined Walpole to withdraw a measure the only fault of which was that it was called by an unpopular name.

But the modern use of the term Excise is largely extended beyond its original meaning. The tax does not include ^{Excise licenses.} customs duties in any form: so far as it falls on commodities, it falls on commodities made or prepared in the United Kingdom. But under the head of Excise appears a great variety of licenses, for the grant of which money has to be paid to the Inland Revenue. Some of these licenses are licenses to sell commodities or to carry on a trade: the bulk of them are known as Establishment licenses, and were formerly known as Assessed Taxes. They are in fact demands made by the State upon the citizen to pay for enjoyment of certain things of convenience or luxury, on the assumption that such enjoyment represents wealth which should thus be called upon indirectly to contribute to public needs. To employ a male servant, to keep a carriage, to use armorial bearings, may be taken to show that one who can afford these ornaments or comforts is able to assist the revenue. Before 1869 the system was to make the taxpayer pay for what he had enjoyed in the preceding year. In 1869 the Assessed Taxes were abolished *eo nomine*¹. The taxpayer is now required to take out a license for his existing establishment at the commencement of each year, and additional licenses as the year goes on if his establishment should be increased.

§ 3. *Stamps.*

A stamp-duty is a convenient mode of levying a tax upon property in course of devolution, just as a license is a convenient mode of taxing property the existence of which is indicated by the use of luxuries.

The two modes of taxation cannot fail to overlap. Whether

¹ 32 & 33 Vict. c. 14, part v.

Stamps
and
licenses.

a receipt for a tax imposed by the legislature is given in the form of a stamp or a license must in many cases be immaterial. It would seem to be of no great importance whether the receipt for the *ad valorem* duty levied on the personalty of a dead man is in the form of a license to take out probate of the will, or a stamp affixed to an inventory of the dead man's estate. Nor would it matter that instead of a license to keep a dog or kill game a stamped receipt for the money required to be paid was given to the payer. In fact, the distinction between stamp duties and other modes of taxing is not a difference in kind. It does not affect the incidence of taxation, but only the mode of collection. A certain amount of the money paid by the taxpayer must always go to the cost of collecting it, and it is the business of Government to diminish as far as possible the cost of collection. There are certain transactions which represent transfers of credit, or creations of liability which it would be difficult to tax otherwise than by requiring a stamp for their validity. But where the legislature demands from the heir a tax bearing a certain proportion to the property which he acquires by succession, the arrangement that the stamp affixed to the receipt of the money should indicate the amount paid, is merely a matter of convenience in collecting the revenue.

Division
of Stamp
duties.

The stamp duties fall now into two groups: (1) the death duties, which are in effect a tax on real and personal property in the course of devolution; and (2) a miscellaneous set of legal transactions which need a stamp for their validity.

The first
stamp
duties.

The first general Stamp Act was passed in 1694, when commissioners were appointed to prepare the stamps and collect the revenue thence arising. The value of the stamps ranged from £2 to 1*d.*, and the documents requiring to be stamped were forms of admission to offices or degrees, marriage certificates, certain writs, affidavits, copies of wills, pleadings and depositions, probates of wills and letters of administration, documents under seal, and contracts not under seal¹.

¹ 5 & 6 Will. & Mary, c. 21.

These duties were increased from time to time, and additions were made to the documents which required stamps for their validity. Bills of exchange and promissory notes were brought within the Stamp Acts in 1782, ordinary receipts for money paid in 1784. The principle of taxing documents not according to their length, but according to the value of the transaction which they embodied, was of very gradual application. Introduced at first in the case of grants to offices in 1714, it was applied to receipts when they were first taxed in 1784, was extended to bonds in 1797, to mortgages in 1804, to conveyances by way of sale in 1808, to settlements in 1815. Their extension.

In 1853 the application of the *ad valorem* principle to receipt stamps having proved onerous in practice, was abandoned, and a penny stamp made necessary for all sums of £2 or upwards. In 1881 the stamp so required was made uniform with the postage stamp, the Post Office handing over in each year to the Inland Revenue Department its share of the produce of the stamp.

§ 4. *Taxes.*

The early history of taxation in this country is difficult to disconnect from the history of the hereditary revenues of the Crown, for the earliest contributions of the country to the maintenance of a Court, and to the needs of self-defence, seem to have grown into matters of hereditary right, and then dwindled until it became necessary to find fresh sources of revenue. Kings were apt to treat these either as Crown property, or as sources which might be drawn upon at will. The nation desired to define precisely the revenues which might be regarded as Crown property, to require the King to 'live of his own'; if more was required, to apply to the Commune Concilium Regni, or later to Parliament, for a grant in aid of his revenues, and to apply the money so granted to the purpose for which it was intended. Taxation and hereditary revenue.

The Saxon king conducted the business of the country with funds provided from the income of the royal estates and of Taxes in Saxon times.

the folkland, and from the produce of the *feorm fultum* due to him for the maintenance of his Court, sometimes rendered in kind, but more usually commuted for money. To this must be added a tax which the Danish invasions made necessary for the defence of the country, the Danegeld, a charge of 2*s.* on every hide of cultivated land.

Under the
Norman
kings.

Under the Norman kings the royal estates and the folkland became alike the property of the Crown, the *terra regis*: the King had therefore a more immediate command of the income thence arising. He retained the *ferm* of the shire, which now took the form of a composition for royal dues. The Sheriff became responsible for the collection of this sum in each shire, and for its payment into the Exchequer¹. The Conqueror increased the Danegeld from 2*s.* to 6*s.* on the hide, and required an analogous payment from the towns. The Norman kings, as supreme landlords, enjoyed in addition the proceeds of feudalism, reliefs, aids, and the incidents due on military tenures. They made the administration of justice a source of revenue, from fines due on Pleas of the Crown, and payable through the Sheriff.

The new
taxes of
Henry II.

In the reigns of Henry II and his sons new forms of taxation arise. The *ferm* of the shire and the Danegeld had long been compounded for by the Sheriff at a fixed sum. They now disappear, except where some items remain among the hereditary revenues of the Crown. The taxation of Henry II, apart from these sources of revenue, was of three kinds, one falling exclusively upon the holders of land in chivalry, another upon all holders of land, a third upon all holders of property of any sort.

Scutage.

The first of these was the scutage, or composition for military service, at the rate of 20*s.* for each knight's fee.

Aid.

The second was a substitute for the earlier Danegeld. Under the various names of *donum*, *auxilium*, or carucage, it fell upon all land, and was computed by the hide, or later by the carucate of 100 acres. Where a payment of this nature

¹ Stubbs, Const. Hist. i. 380, 383.

was demanded by the King, the towns did not escape¹: those which had bought immunity from the jurisdiction and assessment of the shire paid a fixed composition²; others compounded on each occasion with the officers of the Crown³.

These are the two forms of taxation referred to in Magna Charta, where the King promises to levy no scutage or aid, other than the three feudal aids, save with the assent of the Commune Concilium. The third form of taxation fell upon all owners of rent or chattels. It was a tax of a tenth or some other proportionate part of such property. It first appears in the Saladin tithe, but, as the country became wealthier, personal property became a more fruitful subject for taxation, and in the thirteenth, fourteenth, and fifteenth centuries the tenth and fifteenth, which had become the common form of charge on town and shire respectively, became the usual mode by which the representatives of the Commons in Parliament met the needs of the Executive as represented by the Crown.

Taxes on person-
alty.

Before going further into modes of taxing real and personal property, let us note at once the statutory limitations on the powers of the Crown to levy taxes of this sort without consent of Parliament. A tax on movables would not be included under the term scutage or aid used in the Charter, but Parliament in its earliest days was prompt to close this door to royal acquisitiveness. The Confirmatio Chartarum dealt with *aids, tasks, and prises* generally, and contained a promise by the King that such charges should not be made 'but by the common assent of the realm.'

The king's
right to
tax.

The Con-
firmatio
Charta-
rum.

The demesnes of the Crown still offered a wide field for arbitrary taxation, especially the towns in demesne. They were, in fact, the debateable ground between hereditary revenue and parliamentary grant. But after some years of royal exaction and parliamentary remonstrance a Statute of 1340 provided against the nation 'being charged or grieved to make any common aid, or to sustain charge, except by common

The royal
demesnes
and the
Statute of
1340.

¹ Stubbs, Const. Hist. i. 580, 584.

² Ib. i. 584, 625.

³ Ib. 585.

assent in Parliament¹. The year 1332 was the last in which the King tallaged his demesnes².

The Petition of Right.

The forced loans and benevolences of the sixteenth century, and the violent and illegal taxation of James I and Charles I, were met by the Petition of Right, which was conclusive against the legality of direct taxation in any form without consent of Parliament. The Bill of Rights declares in general terms the unlawfulness of levying money 'for and to the use of the Crown by pretence of prerogative for other time and in other manner than the same was granted by Parliament.'

The Bill of Rights.

Forms of taxation.
The 10th and 15th.

To return to the forms of taxation. The old taxes, the scutage, and the aid cease in or about the middle of the fourteenth century; their place is taken by taxes on movables, and the customs duties of which I have already spoken. The taxes on movables assume the form of a fifteenth from the shire and a tenth from the borough³, the tenth and fifteenth being reached by an assessment of cattle and crops, of chattels and stock-in-trade. But in 1334 a calculation was made by which the grant was estimated to produce £39,000, and henceforth the grant of a tenth and fifteenth meant a grant of £39,000 divided in certain proportions among the shires and boroughs. The form of the grant provided for an assessment of movables which, as a matter of fact, never took place.

The subsidy.

As the property on which the tax was supposed to be levied was never re-valued after the middle of the fourteenth century, the tenth and fifteenth became in process of time an unfair tax. It lingered on as an occasional mode of raising money into the seventeenth century, and the last grant of this kind was made in 1623. Its place was taken in the sixteenth and seventeenth centuries by the subsidy. Subsidy in this sense must be distinguished from the subsidy which meant those export and import duties which were called tunnage and poundage, and from the more general use of

¹ 14 Ed. III, st. 2, c. 1.

² Stubbs, Const. Hist. ii. 520.

³ Borough meant parliamentary borough: this was one cause of the reluctance of boroughs to be represented in Parliament.

the term to mean a grant in aid of the ordinary revenues of the Crown. The subsidy of the sixteenth and seventeenth centuries meant a charge of 2*s.* 8*d.* in the pound on movables and 4*s.* in the pound on land¹. A grant of an entire subsidy meant this, and several subsidies were sometimes granted at one time. Except during the Commonwealth this was the ordinary form of taxation until 1663, the clergy taxing themselves apart, though after 1533 the separate subsidies granted by the clergy were required to be submitted for confirmation to the Crown in Parliament. In 1664 the clergy gave up the practice of taxing themselves apart from the laity; at the same time taxation by subsidy was abandoned. The assessment of the taxable property seems to have been conducted with such unfairness or so little care that the poor man paid as much as the rich; and in 1663, when clergy and laity granted each four subsidies, the total amount produced was no more than £282,000.

After the year 1663 we hear no more of the subsidy as a mode of raising money. The ministers of Charles II had recourse to three other forms of direct taxation.

The first of these was a poll-tax, a charge of so much per head on each individual above sixteen years of age. The tax had been employed from time to time from 1377 onwards. It was never popular, and was imposed for the last time in 1698, expiring in 1706. The poll-tax.

The second was hearth-money, a tax on all houses but cottages at a rate of 2*s.* for every hearth or stove. This was imposed in 1662: like the poll-tax it was 'grievous to the people,' and was repealed in 1689. Hearth-money.

The third was the raising of a fixed sum divided among towns and counties, for every month, by an assessment of the value of all real and personal property in the places on which the contribution was levied. The practice began during the Commonwealth, and was adopted after the Restoration as a more effectual means of raising money than the subsidy. The assessment.

¹ Dowell, vol. i. p. 194. But the amounts varied from time to time.

Though more productive than the subsidy, it was not a great success. The largest amount raised was rather more than a million and a half in the year, but complaint was made that personal property did not bear its fair share of the burden, and the practice ceased after 1691.

The Land-tax

Personal property proved no less elusive to the revenue when, in the following year, the last attempt was made to lay a fixed and permanent charge upon all property, real and personal. The so-called Land-Tax of 1692 was, in effect, a subsidy at the rate of 4s. in the pound on real estate, offices and personal property. The amount produced by this tax diminished year by year, till in 1697 Parliament gave up all hope of obtaining a fair return for the rate voted, fixed the sum that a rate of 1s. in the pound ought to produce, and apportioned the money to be raised among the towns and counties of the kingdom. Personal property and offices were to be rated as well as land, but since it was provided that the land should be liable for what the other sorts of property did not produce, the charge in the end fell wholly upon land.

a tax on
personalty
but
evaded.

Settle-
ment of
the land-
tax in
1798.

The tax fluctuated between 1s. and 4s. in the pound for just 100 years, and then in 1798 it was made perpetual by Mr. Pitt at the rate of 4s. in the pound. It thus became a permanent charge on the land in the proportion fixed by the assessment of 1692, and provision was made for its redemption by persons interested in the land on which it fell. The charge upon personalty, which had always been evaded, was dealt with as a separate tax annually granted. It does not seem to have come to more than £150,000, and was repealed in 1833. The tax on offices, and their profits, after undergoing various modifications, was repealed in 1876.

The land-tax, or so much as is unredeemed, remains a source of revenue, and a survival of a mode of taxing which depended for its efficiency upon a constant re-valuation of the real and personal property of the country, just as did the older taxes, the tenth and fifteenth, and the subsidy. Such a re-valuation was never carried out, and each of these

taxes in turn became a fixed charge apportioned among towns and counties. The modern attempts to tax property begin with the Assessed Taxes of 1797, and the forms which such taxation has taken, and now follows, are four. Modern taxation of property.

The first is a tax on income, whether derived from property in land, capital invested in business, skill, or learning exercised in a profession. Income tax.
 The second is a charge on inhabited houses, which, with various changes, has been levied since 1778. House duty.
 The third is a tax on property in the course of devolution, a tax commonly known as the death duties, falling on real and personal property, whether acquired by inheritance or disposition. Death duties.
 Estate duty, legacy duty, and succession duty are now all included under the head of stamp duties. The fourth is a charge on apparent wealth, indicated by the use of certain articles of enjoyment: the taxes of this nature were until lately grouped under the head of Assessed Taxes, and are now collected in the form of excise licenses. Assessed taxes.

The income and property tax was first imposed by Pitt in 1799. It was then a graduated tax on incomes of from £60 to £200 a year, and a tax of 10 per cent. on all incomes above £200. It was dropped in 1802, revived in 1803 at the rate of 5 per cent. on all incomes of £150 and upwards, and was increased from time to time until its repeal in 1815. The tax was revived again by Sir Robert Peel in 1842, at the rate of 7*d.* in the pound, and has continued in existence at varying rates ever since. It falls upon incomes the sources of which are classified as (1) rents and profits arising from property in land, (2) profits arising from the use or occupation of land, (3) investments in the public debt or liability of our own country, its colonies, or any foreign state, (4) the exercise of a profession, trade, or other occupation, (5) employment by the State, or in any corporation or company. The Income tax.

Of these four modes of taxing property, the income and property tax and the inhabited house duty alone come under the head of *taxes*, for the *death duties* are levied by means of stamps, and the *assessed taxes* are now excise licenses.

§ 5. *Post Office and Telegraph Service.*

The Post
Office in
the 17th

The Post Office as a source of revenue dates from the reign of Charles II, though James I deserves the credit of having started a post office to foreign countries for the convenience of English merchants, and Charles I, in 1635, made arrangements for the transmission of letters in England and Scotland, fixing the rates of postage by royal proclamation. The business was entrusted to a Postmaster, who took the risks and profits of the undertaking. In 1660 the Post Office was organized and privileged by Statute¹, and its proceeds made part of the hereditary revenues of the Crown, and in 1663 its revenues were settled in perpetuity on the Duke of York². In 1685 they were again settled on James II as *king*, his heirs and successors. In 1710 the Post Office was again remodelled, and an appropriation of its income made between the civil list and the public service. Since 1760 the hereditary revenues thence arising have been merged in the general revenue, and since 1787 have been paid into the Consolidated Fund.

and in the
18th cen-
tury.

Extent of
its opera-
tions.

The extent of postal operations has varied much at different times. The Post Office began, in the reign of James, as a means of communication for English merchants trading in foreign countries; it continued to undertake foreign postage throughout a great part of the wars of the reign of Anne, conveying not only letters but articles of a very varied sort³. In 1710 its operations were contracted and systematized. A Post Office was provided for Great Britain, Ireland, and the Colonies, and a Postmaster-General appointed to superintend the whole, the office having previously been carried

¹ 12 Car. II, c. 35.

² 15 Car. II, c. 14.

³ The following are examples of these consignments :—

Fifteen couple of hounds going to the King of the Romans with a free pass.

Dr. Crichton carrying with him a cow and divers other necessities.

A box of medicines for my Lord Galway in Portugal.

Two servant maids going as laundresses to my Lord Ambassador Methuen.

—See Report on Public Income and Expenditure, 1869, p. 428.

on by one or more persons under the superintendence of a Secretary of State.

The extension of the operations of the Post Office is a part of our social and economical history. The department undertakes upon certain terms to convey by post letters, newspapers, books, parcels, and patterns or samples; it transmits communications by telegram; it transmits cash by means of money orders and postal orders; it receives and takes care of small savings, and has thus a banking establishment which is responsible for more than £105,000,000; it acts as an office for insurances on life for sums within the limits of £5 and £100, for the purchase of annuities within the limits of £1 and £100, for investments in Government stock to an amount not exceeding £100. Their variety.

The Post Office is therefore not merely a means of communication throughout the United Kingdom and the Colonies: it is also a means of bringing the appliances for thrift within reach of the poor. The growth of its income should be noted. In 1838, the last year before the general reduction of charges, the net income was £1,676,522, the cost of management amounting to £669,756; in the financial year ending March 31, 1869, it was £2,176,660, the cost of management amounting to £2,376,920; in the financial year ending March 31, 1895, the net income was £3,797,000, the cost of management (including that of the Telegraph service) amounting to £9,543,000. The Telegraph service does not pay its own expenses, if these are taken to include the interest of the money invested in the purchase of the property of the Telegraph Companies. Its income.

The exclusive privileges of the Postmaster-General as regards the conveyance of letters rest on 1 Vict. c. 33, s. 2, as regards the transmission of messages by telegraph¹, on 32 & 33 Vict. c. 73, s. 4. Its privileges.

¹ The Telegraph Act of 1863 defines a telegraph as 'a wire used for the purpose of telegraphic communication,' and this definition has been held to include a telephone. *Attorney-General v. Edison Telephone Co.*, 6 Q. B. D. 248.

§ 6. *The Crown Lands.*

The Crown Lands are the only source of the hereditary revenues of the Crown which we need consider, though it may be well to bear in mind that there are other sources of hereditary revenue which are not now collected, or which are surrendered to general or specific purposes. The net produce of such of the Crown lands as are part of the general revenue of the country, amounted in 1894 to £410,000. These lands include all the hereditary landed property of the Crown except the Duchies of Lancaster and Cornwall, which remain a source of private income to the Queen and the Prince of Wales respectively.

The rights
of the
Saxon
king;

Before the Conquest the King had rights over land of three sorts. He held lands of his own, his private property; he held lands in right of his kingship, demesnes of the Crown; he enjoyed rights over the folkland, of a somewhat uncertain character, but including certainly an initiative in granting portions of it to individuals or corporations: to the exercise of this right the Witan were legally parties, though under the later Saxon monarchy their share in making the grant was merely formal.

of the
Norman.

After the Conquest these three rights of the Crown merge in one, the right of the King over the Crown lands. The feudal King is the lord of the land, of whom all estates are mediately or immediately held. All land, therefore, which is not held by the tenants-in-chief or their vassals is the King's; the folkland, the reserve of national property, becomes the *terra regis*. Feudalism, which thus extended the rights of the Crown, provided also in the rules of escheat and forfeiture a means for their further extension. But at the same time the King ceases to be a private owner. The lands which he holds he may use for the maintenance of his own power, or for the security of the nation; he may sell them or give them away, but he can hold no land except as King; his property is inseparably associated with public duty.

An illustration of this rule is found in the fate of the Duchy of Lancaster, the private property of Henry IV ^{The Duchy of Lancaster.} before he ascended the throne. An Act of Parliament was needed to prevent the merger of the Duchy in the Crown lands, an Act obtained in the first instance by Henry IV, repeated with somewhat different provisions by Edward IV, and re-enacted from time to time until the present day. In times when the succession was in dispute, it is not difficult to understand the desire of the King to secure the property of his family to himself and his heirs.

A result of this rule may be seen in the constant supervision exercised by Parliament over the grants of land made by the King. The history of the royal seals indicates the desire to prevent the making of improvident grants; and if, in spite of these precautions, improvident grants were made, Parliament not unfrequently required their resumption. The history of the Crown lands is therefore one of constant fluctuation in extent and value. Escheats, forfeitures, and the seizure of the estates of religious houses, increased the property of the Crown. Profuse grants to courtiers and favourites, sales made, as by Elizabeth, to save the taxpayer, or, as by Charles I, to avoid a summons of Parliament, reduced that property, till during the reign of William III its income was estimated at £6,000 a year. ^{Parliamentary supervision.}

But Parliament, after the Revolution, was determined to control the amount and manner of the expenditure of public money. The sum to be placed at the disposal of the King was limited, and the objects on which the money should be spent were marked out in the Civil List. It was estimated that a part of that sum would be provided by the income of the Crown lands, and Parliament could not allow the King to falsify this estimate by alienating at his pleasure the sources of the income calculated upon. When Anne succeeded ^{The Civil list.} to the throne, the Act which settled the revenue for her reign restrained the Crown, for that and all future reigns, from alienating the Crown lands. During three reigns the Crown

lands formed a constituent part of the Civil List. The hereditary revenues were supplemented by Parliamentary grant calculated to produce the amount which would enable the King to maintain his Court and pay the Civil services. The Crown lands could not be diminished by alienation, but they might fluctuate in value, and this introduced an element of uncertainty into the calculations of Parliament. On the accession of George III he surrendered to Parliament his interest in the Crown lands for his life, receiving in return a Civil List of a fixed annual amount, and his successors have followed his example as to the land revenues of the Crown in England and Wales. Since the beginning of the reign of George IV the same practice has been adopted with regard to the land revenues in Scotland and Ireland.

§ 7. *The Revenues of Scotland and Ireland.*

The revenues of Scotland and Ireland call for a brief notice. At the time of the union with Scotland the Crown had certain hereditary revenues corresponding in character to those of the English Crown, and consisting in part of the rights of a feudal lord, in part of income arising from customs and excise and the Post Office, annexed to the Crown by Acts of the Scotch Parliament.

The
Scotch Ex-
chequer.

The receipt and issue of the revenue took place in the Scotch Exchequer, and the Court of Exchequer controlled the accounts of the Treasurer and Great Chamberlain, the officers of state responsible for the collection of the revenue. The Act of Union constituted the Scotch Court of Exchequer not merely a Court for the decision of revenue cases, but an office in which the collectors of the revenue presented an account of their receipts; this, when allowed by the Court, was passed on to other officers till a discharge was ultimately obtained at the Pipe Office. But in 1832 all powers and duties relating to the administration of the revenue were taken from the Exchequer and transferred to the Treasury at Whitehall.

The financial settlement between England and Scotland at the Union provided that, with certain exceptions as to the operation of existing taxes, the same customs and excise duties should be levied in both countries. Stamp duties were extended to Scotland by 10 Anne, c. 19, and uniformity of postal arrangements was established by 9 Anne, c. 10. Taxation is uniform for the two countries, and since 1822 no distinction has been made between their revenues in the finance accounts of each year.

In Ireland, as in England, the Crown had certain hereditary revenues, and the proceeds of certain taxes, customs, and excise duties granted from time to time by the Irish Parliament. But it is not necessary to trace the history of the revenues of Ireland, of its financial staff, or of its public debt. By the terms of the Union with England in 1801 these were kept distinct, but provision was made for their consolidation in certain contingencies. This consolidation was effected in 1816, when the offices of Lord High Treasurer of England and of Ireland were united, the revenues of the two countries brought into one fund, charged with the payments of the National debts of the two countries, which were henceforth to be treated as one. The subsequent changes of 1834 and 1866 as to the Exchequer offices, as to the mode of controlling receipts and issues, and the audit of accounts, have consequently been applicable alike to Ireland and to England.

SECTION II.

COLLECTION AND EXPENDITURE OF REVENUE.

Introductory.

In order to understand so much as it may be needful to state of the history of this subject, it will be well to summarize the practice of the present day in the collection and expenditure of the revenue and the audit of the national accounts.

The revenue is collected by four great departments; the

Collection of Revenue. Customs, the Inland Revenue, the Post Office, and the Commissioners of Woods and Forests. Other departments receive moneys directly or indirectly in the course of their business. When paid into the Exchequer they fall under the head of revenue described in the Finance accounts as 'miscellaneous'.¹

Revenue paid into Consolidated Fund. Every sum received by these departments is paid into the Consolidated Fund of the United Kingdom; that is to say, it is paid to the credit of the Exchequer account at the Bank of England; or, in Ireland, at the Bank of Ireland. From this fund nothing is paid except by Parliamentary authority. When the authority of Parliament has been given, the Queen directs issues to be made in pursuance of it by an order to that effect countersigned by two Lords of the Treasury.

How issued. But this order is not of itself sufficient to procure an issue of the money for the objects specified by Parliament and the Queen. It empowers the Treasury to call upon the Comptroller and Auditor-General to give to the Lords of the Treasury a credit on the Exchequer account at the Bank. When this credit is given the Bank is requested to transfer the sums specified to the account of the Paymaster-General, and the Paymaster-General is thus enabled to make the payments required by the several departments in accordance with the votes of Parliament. So far security is taken that money voted by Parliament is issued for the purposes indicated by Parliament; it remains to secure that the money is not only issued but spent in accordance with the votes.

Control of issue. So we must note that the Comptroller-General is also the Auditor-General. In that capacity he must satisfy himself by an examination of the accounts, either periodical or concurrent during the financial year, that the payments for which he has given credit are not merely spent on the public service, but have been spent on the services for which he set free the

Audit of accounts.

¹ Such moneys arise from fees, proceeds of sales of old material, and the like. They are either paid into the Exchequer and form those items of revenue which are called 'miscellaneous,' or they are used in aid of the expenditure of the department which receives them and diminish *pro tanto* the amount granted by Parliament to meet such expenditure.

Exchequer balance; that is, for the services specified by Parliament. If not satisfied on this point he must report the facts to Parliament in detail. When the House of Commons receives the departmental accounts of the expenditure on the several votes, together with the Comptroller and Auditor-General's report thereon, they are referred to the Public Accounts Committee, which in its turn reports to the House. Thus the circle is complete: the House which voted money for certain purposes receives full information as to the expenditure of the money on those purposes.

Completeness of Parliamentary control.

§ 1. *History of the Exchequer Offices.*

With this brief outline of the present mode of receipt and expenditure of the public money in our view, we may go back and trace the older system of the Exchequer¹.

It must be borne in mind that until quite recent times the various collectors of revenue actually paid the sums collected by them into the Exchequer, where the money was kept in the Tellers' offices until it was required for the public service. The sheriffs were, in the early days of the Exchequer, the great collectors of revenue. In time their functions in this respect vanished before new sources of revenue and new modes of collection, but the Exchequer of Receipt remained the storehouse to which and from which the public money came and went.

Money used to be paid into Exchequer.

Late in the last century it became the practice to make these payments into and out of the Bank of England; but every day and all day they were accounted for, as made, to the Exchequer, and in the evening the Tellers' chests were opened, and money was paid in or taken out as the balance might be in favour of the Exchequer or adverse to it².

Later into the Bank of England.

¹ The reader who is interested in this part of our constitutional history should refer to *The Antiquities of the Exchequer*, by Mr. Hubert Hall.

² Report on Public Income and Expenditure, 1869, part ii. pp. 342, 343. See too *Recollections of a Civil Servant*, Temple Bar Magazine, Feb. 1891. at p. 209.

As I shall frequently have to refer to the Report of 1869, I shall for brevity's sake refer to it thus, Report, 1869, ii.

The Norman Exchequer.

The Norman Exchequer was divided into two Courts: the Upper or Exchequer of Account, the lower or Exchequer of Receipt. The Upper Exchequer, consisting of Treasurer, Chancellor, and other great officers, the Barons of the Exchequer, exercised a control over all persons who collected or expended the royal treasure. Accounts were here audited and those legal questions relating to revenue were here determined which gave its original jurisdiction to the Court of Exchequer. But the Lower Exchequer or Exchequer of Receipt is that which has most interest for us.

The Exchequer of Account.

The Upper Exchequer developed in two directions. Its revenue jurisdiction, extended by fictions, made it into a great Common Law Court, severed except in a formal sense from the ancient Exchequer. Its duty as a place of account and audit was discharged with less and less efficiency, till at the end of the last century the lucrative sinecures which purported to be offices of audit were abolished, and the duty of auditing the public accounts was assigned to a body which has no historical connection with the Exchequer of Account.

The Exchequer of Receipt;

its officers;

its procedure in payment;

As some of the King's revenue was paid at the King's palace, 'in camera regis¹,' the Chamberlain was, with the Treasurer, a chief officer of the Exchequer of Receipt. The Chamberlain's office broke up into three: the hereditary sinecure office of the Lord Great Chamberlain, the King's Chamberlain, and the Chamberlains of the Exchequer.

Payments out of the Exchequer were made in pursuance of a royal order under the Great or Privy Seal, usually addressed to the Treasurer and Chamberlains.

Payments into the Exchequer were recorded by the Treasurer's chief clerk and the two Chamberlains.

The payer of money into the Exchequer received a tally, or one half of a notched stick split down the middle; the notches corresponded to the amount paid, and that amount

¹ Madox, cited in Report, 1869, ii. pp. 340, 341, and see Stubbs' Const. Hist. ii. 276, as to the confusion, in the fourteenth century, of the household and the national accounts.

was also written at the side. The other half was kept at the Exchequer. Similar tallies were given to persons who were entitled to receive money from the Exchequer, where it was intended that they should obtain the money from some public accountant on its way to the Exchequer. The first sort of tally was called a Tally of *Sol*, the second a Tally of *Pro*¹.

These tallies were in use until 1826, when, by the death of the last of the Chamberlains, an Act passed forty-four years earlier came into operation², and their use was discontinued.

The ancient process of the Exchequer was simple. Three ^{in account.} officers, the Treasurer's clerk and the two Chamberlains, kept three separate accounts of money received; they paid out money due under orders properly authenticated from the Crown, and kept a similar triple record of money so paid. These last were called pells of issue, or parchment rolls on which the money paid out was entered. The accounts of each officer were compared with those of the other two, daily, weekly, half-yearly.

In the reign of Henry VII this record of issues was discontinued, but that of receipts was still made, for a century ^{Changes of 16th century.} in triplicate, afterwards by one of the Treasurer's clerks.

¹ The scale of notches was as follows :—

1½ inch, £1000.

1 „ £100.

½ „ £10; a half notch of this size denoted £1.

¼ „ a shilling; the smallest notch a penny; a small round hole a halfpenny; a cut of a notch denoted half the amount.

*Je lève le compte de l'année 1472 par le dit Chamberlain
pour le dit Roi de France. Le dit compte est de
£236 4s. 3½d.*

£236 4s. 3½d.

² 22 Geo. III, c. 82. The rest of their history is not commonplace. The returned tallies were stored in the ancient Star-chamber, which they filled from floor to ceiling. When, in 1834, it was desired to use this room, orders were given to destroy the tallies. They were used as fuel in the stoves which warmed the Houses of Parliament; they overheated the flues, and burned down the Houses.

The
Tellers.

The issue and record of issue of public money was placed in the hands of four new officers, the Tellers of the Exchequer, who accounted to the clerks of the Treasurer for disbursements made.

The Cham-
berlains.

Of the three parties to the triplicate record of earlier times the Chamberlain's duties dwindled to the preparation and custody of the tallies; but the clerical staff of the Treasurer developed for themselves a new, and, as it proved, a very remunerative sphere of activity.

The Au-
ditor of
Receipts.

One of them received and audited the Tellers' accounts, and hence was called Auditor of Receipts; in course of time his concurrence became necessary to the issue of money. Another, whose duty it had been to write out a pell or parchment of the receipts, obtained authority under the Privy Seal to make a similar pell of the issues. His office, that of Clerk of the Pells, became a record office of all receipts and issues.

The Clerk
of the
Pells.

Here we have the Exchequer staff down to the year 1834. Four Tellers, who received and paid out the revenue; two Chamberlains, who struck the tallies and examined the two parts to see that they corresponded; a Clerk of the Pells, who recorded all issues and receipts; an Auditor of Receipt, who kept a similar record, and who had important duties with respect to the issue of money.

Use of
these
offices in
the 18th
century;

These offices were paid until the commencement of the present century by fees and percentages; their duties were discharged by deputy, and they formed the great prizes of political life, whereby a minister was enabled to provide for his family.

The names of those who held these offices in 1821 is significant of the objects which they served. The four Tellers were Lord Camden, Lord Bathurst, Mr. Charles Yorke, and Mr. Spencer Perceval; the Clerk of the Pells was Mr. Henry Addington; the Auditor of Receipt was Lord Grenville.

their emo-
luments.

As the income and expenditure of the country grew the emoluments of these offices became enormous. In 1783

Parliament settled their salaries at fixed sums: £4,000 a year for the Auditor, £2,700 for each Teller; £1,500 for the Clerk of the Pells. The change was to take effect as vacancies occurred; but in 1812 Lord Camden, the last of the Tellers under the old system, volunteered a surrender of so much of his emoluments as exceeded £2,700 a year. When these offices were abolished in 1834 Lord Camden was still a Teller, and his contribution to the revenue had amounted to £244,400, being the amount of his fees in excess of the statutory payment. He was nearly a quarter of a million the poorer for putting himself on a par with his fellow-sinecurists at £2,700 a year.

§ 2. *The Course of the Exchequer.*

We may now study the working of this machine. But we must bear in mind that the Treasurer and the Chancellor of the Exchequer were the officers ultimately responsible; that the Exchequer was a means of ensuring that the King got his rights, and paid no more than he was obliged to pay; and that the idea of a Parliamentary control over the issue and expenditure of the Exchequer receipts was foreign to the minds of those under whose care the machinery of the Exchequer was elaborated.

The relations of Parliament to the expenditure of the revenue may be said to have passed through three stages. Parliamentary control.

In the first a life-income was assigned to the King, in addition to his hereditary revenues, to be spent as he pleased. First stage. So long as the King did not exceed this income Parliament asked no questions. If he wanted more, Parliament was moved to ask where the money had gone, and why more was wanted; but the Commons were more concerned to prevent illegal taxation than unauthorized expenditure.

The second stage begins with the appropriation of subsidies to special purposes in the reign of Charles II. Second stage. From that time until 1834 Parliament endeavoured through the existing machinery of the Exchequer to secure that money

granted for special purposes should only be issued for those purposes, and to construct a system of audit which should secure that the money was not only *issued for* but *expended upon* those purposes.

Third stage.

The third stage begins with the year 1834, when the old offices were abolished and a system commenced, ending in the legislation of 1866, whereby the control of issue and the audit of accounts are brought into the same hands, and the result reported to the House of Commons.

First stage.

Legal control over royal action.

Of the first stage I need say little. But it should be noted as a check on the powers of the Crown in administration that the King's command was not enough to authorize an issue of his treasure; that such a command must be authenticated by letters patent or writ under the Privy Seal. And further that the withdrawal of the Treasurer from active participation in the routine of the Exchequer led to a complicated system of Treasury warrants, preliminary to the issue of public money, known as 'the course of the Exchequer,' and strictly enjoined upon the officers for the receipt and issue of public money by 8 & 9 Will. III, c. 28.

Second stage.

Appropriation of supply by Parliament.

The second stage began with the appropriation to certain purposes of subsidies granted to Charles II. It was developed after the Revolution into a complete appropriation of all supplies except the hereditary revenue. Even these were considered as practically appropriated to the Civil List, and were taken account of in the sum assigned to the purposes of the Civil List. From the time that George III surrendered his hereditary revenues no money could be expended without the consent of Parliament. The revenues of the Crown have come to be recognized as public money, as a part of the revenues of the country.

The second stage in working.

So I will endeavour to trace the control of issue and the history of the audit of accounts as they existed between 1688 and 1834.

We must suppose that Parliament has granted certain sums to the Crown to be raised from certain sources, and applied

to certain purposes. We must further suppose that the various persons whose duty it is to collect the revenue have duly collected it and paid it into the King's Exchequer. The money is there: how is it to be extracted and applied to the purposes for which the King's ministers have asked for it from Parliament?

The process began then, as now, with a royal order, which was an authority for letters of Privy Seal. These were transmitted through the Treasury, together with a Treasury warrant for the issue of the money required, to the Auditor of Receipt. That great personage himself signed an order for payment, and returned it to the Treasury with the warrant. Both documents came back signed by members of the Treasury Board, together with a letter specifying the date at which the money was to be issued, and the fund out of which it was to be paid ¹.

Thereupon the Tellers unlocked one of the four chests, one of which was kept in the room of each Teller. Even this could not be done without the aid of the Auditor and the Clerk of the Pells, for each chest had three locks, and Teller, Auditor, and Clerk each had the key of one. So when the deputies of these three functionaries had opened a chest, and had handed some portion of its contents to an individual payee or to a Bank cashier to be placed to the credit of a department which had an account at the Bank of England, the Exchequer had done its work as regarded that particular *item* of expenditure.

The Auditor of Receipt was the hinge on which turned the lid of the Treasury chest, for the Act of William III ² forbade the Tellers to issue money without his order. He was in fact a Controller rather than an Auditor. His functions were to see that money was legally issued, not that it was properly spent.

The value of the office to the public service would depend entirely on the independence of the Auditor in respect of

Issue of
public
money.

The
Tellers.

The
Auditor.

how far
useful.

¹ Report, 1869, ii. p. 343.

² 8 & 9 Will. III, c. 28.

political or party ties, for it would be his duty to resist attempts on the part of the Crown or its ministers to use public money either without Parliamentary authority or for purposes other than those authorized by Parliament.

Lord
Grenville
as Au-
ditor ;

How far the holder of the office took this view of his duties may be learned from the conduct of Lord Grenville. He was Auditor of Receipt from 1794 to 1834, when he held a prominent place in politics as leader of the Whig party.

when
Prime
Minister ;

In 1806 he became Prime Minister, and proposed to take the office of First Lord of the Treasury. In this capacity he would be responsible for the royal orders and Treasury warrants, the validity of which he would have to consider as Auditor.

But he did not propose to resign the Auditorship, and when the incompatibility of the two offices was suggested in the House of Commons it was suggested in a tone of apology lest the objection should savour of constitutional pedantry. Eventually Parliament enabled Lord Grenville to place the Auditorship in the hands of a trustee during his continuance at the Treasury Board ; but it is plain that neither he nor his friends saw any incongruity in the tenure by the same man of two offices, one of which involved the giving of orders for the issue of public money, while the other was solely concerned with seeing that those orders were valid.

when in
Opposi-
tion.

In 1811 Lord Grenville was in opposition. The party of which he was a leader was extremely anxious that a Regency Bill should be pushed on, and that it should impose the least possible restraint upon a Regent who was supposed to favour the Whigs. The King was mad, and the forms of government, where he was concerned, could only be supplied by a fiction. Parliament had voted £500,000 for the army and as much more for the navy : the money was in the Tellers' chests and the payment was urgently needed. The Lords of the Treasury, acting on the vote of Parliament, sent a warrant for payment to the Auditor, but there was no authority under the Privy Seal, because, while the King was mad, the sign

manual could not be obtained to authorize the affixing of the Privy Seal, and the clerks of the Privy Seal had scruples.

So too had Lord Grenville. When Prime Minister he had thought so little of the duties of the Auditor as a control upon the Treasury that he was prepared to act at once as Auditor and as First Lord. But as a leader of Opposition he awoke to the conscientious obligations of his office. Nothing but a strict adherence to the 'course of the Exchequer' would satisfy him. He had the law on his side, and he was able to hurry on the Regency Bill, to inconvenience his political opponents, and finally to obtain a resolution of both Houses which satisfied his conscience in doing what the needs of the public service demanded.

One must infer from the tenure of the Auditorship by Lord Grenville that the system of control down to the year 1834 was not very valuable as an administrative check, though it might serve the purpose of political obstruction.

§ 3. *Changes between 1688 and 1866.*

We have now dealt with the process of issuing public money and the securities offered by the 'course of the Exchequer' that money was not issued save for purposes authorized by Parliament.

We must next inquire what were the means for ascertaining whether money, issued in accordance with Parliamentary authority, had been actually spent as intended. Revenue issued to a department for one purpose might be spent on another; or the persons to whom it was issued might squander or misapply it. In the first instance Parliament would be defrauded, in the second both Parliament and the Crown.

Some sort of audit existed from very early times¹. The receivers of revenue accounted to the Treasurer and Barons, and later to the Auditors of Imprest, and the issue of money was audited first by the Barons, then by auditors appointed for

The old
system of
audit.

¹ Report, 1869, ii. p. 331, and see Thomas, *History of Exchequer*.

The auditors of imprest.

different classes of expense. A systematic audit appears to have been provided in the reign of Elizabeth, when Auditors of Imprest, or money issued for public use, were established. The two Auditors of Imprest, like the great officers of the Exchequer, were paid by fees and did their work by deputy. In 1783 their audit was found to be a farce, and each Auditor was found to be in receipt of £16,000 a year¹. In 1785² they were abolished by statute, and a body of five Commissioners appointed for auditing the public accounts.

1805.
Audit
Board.

This can hardly be said to have been an immediate success, for in 1806 the Chancellor of the Exchequer complained that the expenditure of more than £450,000,000 of public money was at that date unaudited. But this Audit Board inherited large arrears from its inefficient predecessors. Its powers were extended by statute and it developed a high degree of efficiency. Its duties were however transferred to the Comptroller and Auditor-General by the Exchequer and Audit Act of 1866, to which I shall presently refer.

1787.
Consolidated
Fund.

The institution of the Audit Board was followed in 1787 by the institution of the Consolidated Fund. From the Revolution until 1787 it had been the practice to assign specific taxes to specific charges, with the result that the public accounts became extremely complicated. In the Customs, for instance, there were seventy-four separate accounts, each setting forth the receipt of revenue from a particular source and its expenditure on the service to which it was appropriated. In 1787 was established the Consolidated Fund into which was 'to flow every stream of the public revenue and from whence to issue the supply for every public service³.' The produce of particular taxes was no longer appropriated to particular heads of expense.

1802.
Accounts
compiled.

From the death of Anne until 1802 no regular statement of the finances of the country was compiled or published, and

¹ Report, 1869, ii. 331.

² 25 Geo. III, c. 52.

³ Thirteenth Report of Commissioners of Public Accounts, March, 1785. The Consolidated Fund was established by 27 Geo. III, c. 13.

until 1822 no *balanced* annual account of the public income and expenditure was presented to Parliament.

Since 1822 such statements have been regularly presented.

In 1826 the Chamberlains and their tallies disappeared.

In 1832 besides the *cash* account there was introduced an *appropriation* account of the money received for expenditure on the Navy. This form of account, which presents the correspondence of the Parliamentary grant with the ultimate outlay, has since been applied to every head of public expenditure¹.

In 1834 the Exchequer offices were abolished, and with them the costly sinecures, the cumbrous procedure, the unintelligible language, and yet more unintelligible numerals, which had formed part of the 'course of the Exchequer'².

Henceforth the revenue of the country was to be paid to the Exchequer account at the Banks of England and Ireland, and the payments which had been heretofore made at the Exchequer itself (as distinct from those made through the Paymasters of the Army, Navy, and Ordnance) were to be made by one person, a Paymaster of the Civil Service.

The Comptroller-General and his staff took the place of the Auditor of Receipt and Clerk of the Pells. He was sheltered from political or party prepossessions by a disability to sit in Parliament; like the judges, he held office during good behaviour, but was removable by the Crown on address of both Houses of Parliament³. Without his authority no money could be issued from the Exchequer account by the Banks of England and Ireland. Every credit which he opened there in favour of any department of the public service was recorded in his office, and this record was the foundation of the Public Accounts.

¹ Applied to Naval expenditure by 2 & 3 Will. IV, c. 40; to Military expenditure by 9 & 10 Vict. c. 92; to all expenditure by 29 & 30 Vict. c. 39.

² Instead of seventy-five clerks, besides messengers and watchmen, the new establishment consisted of the Comptroller-General, the Assistant-Comptroller, the chief clerk, the accountant, and five clerks, in the principal office. Recollections of a Civil Servant, Temple Bar Magazine, Feb. 1891.

³ 4 & 5 Will. IV, c. 15.

Pay-
master-
General.

In 1836 was constituted the office of Paymaster-General through whom are now paid all the public moneys due for the Army, Navy, and Civil Services ¹.

Com-
mittee
of Public
Accounts.

In 1861 the House of Commons adopted the recommendation of the Committee on Public Moneys, that a Committee of Public Accounts should be annually appointed to report on the accounts presented to the House. Of the duties of this Committee I will speak presently.

In 1866 the Audit Board and the Comptroller-General were abolished by the Statute on which rests our present system of control of issue and audit of accounts.

§ 4. *The Exchequer and Audit Act and Modern Practice.*

The Ex-
chequer
account at
the Bank.

I stated at the outset of this chapter that the revenue of the country as it is collected by the departments responsible for its collection, is paid into the Consolidated Fund in the Bank of England. This Fund is not a hoard, but a balance. The Bank can use it, as any other banker can use the balance of his customer, so long as it is forthcoming when required.

The
collecting
depart-
ments.

The Customs, Inland Revenue, and Post Office are the departments in which revenue is constantly accruing. The Receiver of the Commissioners of Woods and Forests who manage the Crown lands is also in communication with the Bank. The departments in which miscellaneous revenue accrues are not collecting departments, nor are they in direct communication with the Bank. In so far as the moneys which they receive pass into the Exchequer at all they pass through the departmental account with the Paymaster-General.

The
mode of
collection.

The collectors of these three departments send the daily proceeds of their collection to the accounts of their respective departments at the Bank, reserving, under regulations to be explained hereafter, certain sums for local expenditure. The

¹ See 5 & 6 Will. IV, c. 35; 11 & 12 Vict. c. 55, whereby the various offices of Paymaster were consolidated into one office.

departments pay over, daily, the amount received to the account of the Exchequer, that is to the Consolidated Fund. Sooner or later every penny of revenue collected—including, as I will presently show, the sums reserved by collectors for local use—finds its way to the Consolidated Fund.

The revenue may increase or diminish from two causes. Parliament may increase or diminish taxation, or commercial and agricultural prosperity may wax and wane. But we are not concerned here with the economical considerations which affect revenue. We must assume that, such as it may be, it is flowing steadily into the Exchequer balance, and that the expenditure of the country is going on at the same time; and we ask how is the revenue made applicable to the expenditure?

For any use of the public money the authority of Parliament is universally necessary. If that authority is, in certain cases and under settled rules, anticipated, as when the collectors of revenue meet the immediate charges of their departments, their action, in order to be legal, must be ratified by Parliament in the course of the year.

Parliamentary authority for Expenditure

But the authority given by Parliament is of two kinds, permanent and annual, and this at once divides the expenditure of the country into two classes, the first consisting of fixed charges on the Consolidated Fund, or *Consolidated Fund Services*; the second consisting of sums granted every year by Parliament, the grant being initiated by the House of Commons in Committee of Supply, and hence called *Supply Services*.

permanent.

I have described elsewhere the process by which Parliament votes these annual services¹. The matter before us is how, when voted, they are spent.

The public service is maintained by payments made under the direction of the Treasury out of the national balance, the Consolidated Fund. But neither the Lords of the Treasury, the political executive, nor their permanent staff can touch

¹ Vol. i. Parliament, ch. vii. sect. iii. § 2.

this balance without the intervention of an official who is remote alike from royal and political influences.

The Comptroller and Auditor-General.

This is the Comptroller and Auditor-General, the creation of the Exchequer and Audit Act of 1866¹. He is appointed by letters patent. Neither he nor the Assistant-Comptroller and Auditor may be a member of either House of Parliament. They hold office during good behaviour, and they are removable by the Queen upon address by both Houses of Parliament. They may not hold their offices in combination with any others held at the pleasure of the Crown. Their salaries are charged on the Consolidated Fund, so that they do not come under the annual consideration of the House of Commons.

Consolidated Fund Services.

Issue of money for Consolidated Fund services;

Where money is wanted to meet *Consolidated Fund Services* the Treasury makes a requisition to this officer for a credit on the Exchequer account. The Comptroller and Auditor-General, if satisfied that the requisition is in accordance with the Acts which govern the proposed expenditure, makes the order, and thus unlocks the Treasury chest. The Treasury then requires the Bank to transfer the sums required from the Exchequer account to the account of a principal accountant, usually that of the Paymaster-General²; and at the same time to transmit the authority for the transfer to the Comptroller and Auditor who is thus enabled to record the issues from the Exchequer. Of these he subsequently receives and examines an account called the Consolidated Fund Account.

their amount and character.

The charges on the Consolidated Fund amount to about three-eighths of the national expenditure. They are to be seen in detail in the Finance Accounts of each year. They are of a miscellaneous character, including the interest on the

¹ 29 & 30 Vict. c. 39, s. 3.

² Payment of dividends due by way of interest on the National Debt is made by the Banks of England and Ireland, which receive about £190,000 a year for services in this respect.

National Debt, the salaries of the Judges, of the Speaker, of the porter of Holyrood House, of the perpetual curate of the Isle of Alderney, and of the Regius Professor of Civil Law in the University of Oxford.

Supply Services.

The remaining five-eighths of the national expenditure is voted every year by Parliament. We must consider how this expenditure is estimated, voted, and paid.

In the last two months of every year the estimates for the Estimates. Army, Navy, and Civil Service are presented by the departments concerned, separately, to the Treasury. There they must be considered and approved: for the Treasury guards the public purse, and the Chancellor of the Exchequer, who must ask the Commons to vote the money, becomes thereby responsible for the demands of these departments.

Important questions of expenditure on the Army and Navy are settled by him in Committee of the Cabinet, with the heads of those great departments. Such questions are matters of general policy, and these estimates when agreed to by the political chiefs are only subject to Treasury supervision in minor details.

But the Chancellor of the Exchequer may find himself in Conflict of departments. conflict with the heads of the spending departments. The War Office, for instance, may want more than he thinks it necessary or prudent to ask Parliament to grant. In such a case he may adopt one of two courses. He may refer the estimates back to the spending department whence they came, with a request that a substantial reduction may be made, or he may, with the aid of his permanent staff, contest the various items of expenditure and endeavour to convince the War Office that less will suffice. If the parties cannot agree they may appeal to the Prime Minister, and from him to the Cabinet. Here the dispute must end in one of three ways—by one or other minister accepting defeat, or by the

resignation of the minister against whom the decision of the Cabinet has gone, or by a compromise in which the Chancellor of the Exchequer agrees to ask for a sum rather larger than he considers to be necessary, while the Secretary of State for War agrees to forgo some outlay which he believes to be important for the public service.

But the more valuable part of Treasury control consists in the need of Treasury sanction to the creation of any new post or the increase of any salary in the Civil Service; payments made for such objects without such sanction would be disallowed at the audit of accounts; and this sort of supervision stops the constant leakage of public money in *items* of outlay trivial in themselves, but amounting in the mass to a heavy demand upon the taxpayer.

Votes.

But let us suppose the parties to be agreed. The estimates are submitted to the House of Commons in certain large subdivisions or chapters, technically called '*votes*.' The Army and Navy estimates are each broken up into from ten to twenty of these votes, the Civil Service estimates into about eighty.

Supply.

If the House of Commons approves of these estimates it agrees to them in Committee of Supply, and provides for them in Committee of Ways and Means, by grants from the Consolidated Fund. These resolutions in Committee of Ways and Means, adopted by the House, are (as I have explained elsewhere) embodied in Bills, once or twice throughout the Session. Such a Bill, when it has passed the Lords and received the assent of the Crown, becomes a Ways and Means Act, or Consolidated Fund Act, and gives Parliamentary authority for the payment of public money while the Session is going on, and before the Appropriation Act is passed. This Act embodies the previous Acts, sets out in detail the votes sanctioned by the Commons in Committee of Supply, and appropriates to them specifically the sums needed from the Consolidated Fund.

Ways and Means.

The Appropriation Act.

Pending the Appropriation Act, the Ways and Means Acts

provide for the immediate needs of the Army, Navy, and Civil Service¹, so far as Parliament is concerned.

The money has been granted to the Crown by Parliament for certain purposes: and the first step in the process of expenditure is a Royal Order, reciting the grant and desiring the Treasury to authorize the Bank of England to make payments from time to time in accordance with the terms of the grant. The order is under the sign manual and is countersigned by two Lords Commissioners of the Treasury.

Royal
Order.

The Lords Commissioners thereupon demand of the Comptroller and Auditor-General that he will give them credit for the sums required upon the Exchequer account at the Bank. This is done. The Treasury then, from time to time, directs the Bank to transfer the sums specified in the Royal Order to the 'supply account' of the Paymaster-General, and to communicate such transfers to the Comptroller and Auditor-General².

Requisition
for
credit.

Transfer
to Pay-
master-
General.

The departments are then informed that the sums voted by Parliament, or part of them, are placed to their account with the Paymaster-General. Thenceforth they are responsible for the disposition of the money in accordance with the votes, and this responsibility is enforced by the Comptroller and Auditor-General.

Account and Audit.

So far we have traced the revenue from the pocket of the taxpayer into the hands of those to whom payment is due for the rendering of some public service.

We have seen that the produce of the taxes imposed by Parliament must lie at the Exchequer account in the Banks

¹ In the case of the Army and Navy but one account is kept for each service, and money granted under any one vote may be temporarily applied to purposes specified in the other votes, provided always that in the end each vote of the House is satisfied. The Civil Service votes have each a different account at the Pay Office, and so a sum has to be obtained on each vote for the expenditure on the Civil Service and on the collection of Revenue.

² For the forms relating to this expenditure see Appendix iii.

The Comptroller and Auditor-General.

of England and Ireland until Parliament has given authority for its expenditure, and that so much of this produce as is granted from time to time by Parliament to the Crown cannot be withdrawn by the servants of the Crown from the Exchequer balance without the sanction of an independent, non-political officer who holds, as it were, the keys of the Exchequer.

We have still to see how security is taken that the money issued for certain purposes is actually expended on those purposes: that not merely the issue, but also the expenditure of the money paid corresponds with the votes.

Accounts furnished to him,

The security required is obtained by the twofold powers of the Comptroller and Auditor-General. He not only controls the issues, but receives and audits the accounts of expenditure. Every day two accounts are furnished to him, one from the Banks of England and Ireland, of receipts and issues of the Consolidated Fund, and one from the Revenue departments, of the sums paid to the Fund. These (which are also supplied to the Treasury) enable him to check the Bank account as to receipt of revenue. He also follows, very closely, the course of expenditure, having in the larger spending departments a local staff whose audit may be said to be concurrent with the outlay. In smaller departments his audit is periodical and monthly.

audit conducted by him.

In respect of the Consolidated Fund Services and the Supply Services, Parliament receives every year Finance Accounts and Appropriation Accounts.

Finance accounts.

The Finance Accounts are laid before Parliament on or before June 30 in each year. They are prepared by the Treasury, and they contain a detailed statement of the receipts and of the issues for Consolidated Fund Services as well as Supply Services. But so far as expenditure is concerned, these accounts only state the purposes for which the money was issued.

Appropriation accounts.

The *Appropriation* accounts on the other hand are rendered to the Comptroller and Auditor-General by the departments

which have been entrusted with the expenditure of public money. They are examined by him in order that he may ascertain whether the money has been spent in accordance with the votes of Parliament: whether any Acts of Parliament, Orders in Council, Royal Warrants or other authority governing any particular expenditure have been duly complied with: whether increased salaries or new offices have arisen without the previous sanction of the Treasury. Thus the Comptroller and Auditor-General acts on behalf of the House of Commons and of the Treasury, ensuring not merely that expenditure is in correspondence with the votes, but that it is made subject to the control with which Parliament has invested the Treasury. The Appropriation account relates to *Supply Services* only, but the Consolidated Fund Services are also examined and reported upon.

Our expenditure is spread over a wide surface, and the accounts of the financial year ending on March 31 do not all reach the Comptroller and Auditor-General until November 30 following: but in February of the next year his report is laid before the House in three volumes dealing respectively with the Army, Navy, and Civil Service.

The House refers the reports to the Public Accounts Committee—a standing Committee—which examines them and calls attention to any want of correspondence between votes and payments or other irregularity which may appear on the reports of the Comptroller and Auditor-General.

Public
Accounts
Com-
mittee.

The Reports of the Public Accounts Committee are dealt with in the first instance by Treasury Minutes, directing the spending departments to observe the recommendations made by the Committee. A serious discrepancy between the votes and the expenditure would no doubt be taken up by the Opposition and dealt with by the House.

So we may summarize this procedure. The Commons vote Summary. and Parliament enacts that certain sums shall be granted to the Queen for certain purposes. It is the business of the Treasury to see that the money so granted is issued for

the purposes for which it was granted. After this the departments which receive the money are responsible for its proper application. The duties of the Comptroller and Auditor-General are, as regards issue, ministerial; as regards expenditure, judicial. When he is satisfied of the intentions of Parliament that money should be spent on a given object he ministers to the needs of the Treasury; when the money has been spent he judges whether or no it has been spent in accordance with the votes of Parliament.

When he has reported to the House of Commons the circle is complete, and the House which granted and appropriated the money learns how far its intentions have been carried into effect.

There are still a few points to note.

Supple-
mentary
estimate.

Estimates prepared in November of one year may be found in the next to be insufficient, and this may be discovered before the end of the Session, or before the end of the financial year. When this happens supplementary estimates are presented either at the end of one session or the beginning of the next, so that supply may be granted, a Ways and Means Act passed, and the transaction concluded within the financial year which ends on March 31¹.

Excess
vote.

Or at the close of the account it may be found that a vote has been exceeded, that is to say, that a department has spent more on a given object than Parliament had granted for that object. This would be matter for inquiry by the Public Accounts Committee. An excess vote is by their recommendation submitted to the House and passed, in order to make good the deficiency.

It was stated in general terms that all payments were

¹ Until 1800 the financial year began on old Michaelmas day. From 1800 the financial accounts were made up to January 5. From 1832 to 1854 an anomalous practice prevailed. The accounts were made up to January 5, the supplies were granted to March 31, and the Chancellor of the Exchequer presented his Budget statement as up to April 5. From 1854 the financial year has begun on April 1 and ended on March 31. 17 & 18 Vict. c. 94, s. 2.

made through the Paymaster-General. But this must be qualified in certain ways.

First, the Treasury makes advances to sub-accountants of the Army, Navy, and Civil Service at distant stations. This is done out of the Treasury Chest Fund, a banking fund with a capital of not less than £700,000, or more than £1,000,000, the dealings with which are regulated by Statute¹. These advances are reclaimed throughout the year by the Treasury from the different departments to which money has been voted to meet these payments, and an account is rendered by the Treasury, at the end of the financial year, to the Comptroller and Auditor-General.

Next, the Treasury deals in like manner with another fund at its disposal, called the Civil Contingencies Fund, which has a fixed capital of £120,000. Advances made in anticipation of Parliamentary votes, and to meet unforeseen contingencies, are all repaid to this fund by the orders of the departments concerned, on demand from the Treasury, when Parliament has voted the money. Repayments to this fund are not made until the year after the money has been advanced.

Thirdly, the collectors of revenue are authorized, under certain regulations, to make payments in their districts out of the funds which they collect. These payments may be needed for the expenses of the collecting department, or they may be advances to other services within the district, and may thus save the transmission of money to and fro. Such advances are repaid to the revenue department, and when repaid are at once paid into the Consolidated Fund.

Thus a collector of customs on a given day receives £700 of revenue, of which £150 is required for the expenses of his department, and £100 for the army. These charges he meets, and if the Bank of England has no local branch on the spot he pays in the remaining £450 to a local bank, obtaining a bill payable in three or four days in London. This he trans-

¹ 40 & 41 Vict. c. 45 ; 56 & 57 Vict. c. 18.

and re-
paid.

mits to the Customs Office in London, together with vouchers for the £250 expended. The £450 is paid by the Customs at once into the Consolidated Fund. The two other sums will in due course be recovered out of money granted by Parliament in the one case for the Army, in the other for the collection of revenue, and issued to these departments, under the formalities described earlier. When recovered they are paid into the Consolidated Fund.

Thus all revenue, sooner or later, goes into the Consolidated Fund, and all payments are ultimately provided for by Exchequer issues.

The
national
accounts
are cash
accounts.

Another feature to note in the mode of keeping and presenting the national accounts is that they are strictly *cash* accounts. Taxes due for the year 1895-96, but not paid till April 2, 1896, are treated as the receipts of the year 1896-97. Liabilities incurred in one year but not paid till the next are charged against the revenue of the year in which they are paid.

Conveni-
ences of
this
method.

Although for purposes of account and audit nothing is treated as a final payment until accounted for as actually expended, yet issues made from the Consolidated Fund to the accounts of the various departments with the Paymaster-General are treated as expenditure for the purpose of an *interim* account. This practice, together with the daily record of receipts and issues, makes it possible to produce a statement of the national income and expenditure up to date, on any day, with a few hours' notice.

§ 5. *Change in character of Treasury control.*

Duties of
Treasury
and Ex-
chequer :

to the
King be-
fore 1688,

Before the Revolution the Treasurer was concerned with expedients for raising revenue, and with the direction of expenditure. The Exchequer officers received the revenue, and took charge of it, and saw that it was not issued except by proper authority. But they all alike had to consider only the King's interest, and, except in the case of the

appropriated subsidies of Charles II, to carry out the King's directions.

From the Revolution onwards the Treasury and Exchequer have been called upon to carry out the directions of Parliament in respect of supplies specifically voted for and appropriated to certain purposes. to Parliament since.

Throughout the early part of the last century the duties of the Treasury Board were carefully discharged. The representatives of the Army, Navy, and Ordnance came to the Board for the moneys voted by Parliament, and these sums were paid out in strict conformity with the votes of Parliament and the needs of the services.

From the time that the King received a fixed income independent of the hereditary revenues, his interest in the business of the Treasury declined, and he ceased to preside at the Treasury Board. The rapid changes of ministry which took place between 1760 and 1770, and the immense cost of our participation in the Seven Years' War, and of our struggle with the American colonies, seem to have relaxed Treasury control, and in other respects to have brought out the weak points of our financial system. The issue and expenditure of the revenue had ceased to be important to the King, and the Treasury had not realized its responsibilities to Parliament and the nation. So from 1760, or earlier, to 1780 our public service seems to have been a paradise for sinecurists and unscrupulous consumers of the public money. Relaxed control after 1760.

The Civil Service was paid partly by charges on the Civil List, partly by fees received from those who had to do business with the public departments, or, where the business was concerned with the public money, by percentages on the sums dealt with. The Commissioners of Public Accounts appointed in 1780 found the Tellers of the Exchequer and Auditors of Imprest enjoying incomes of from £10,000 to £15,000 a year, and doing nothing except by deputy. Payment of Civil Service by fees, and percentages.

of other
services,

through
officers.

Abuses.

Com-
mittee of
Public
Accounts.

Changes
in modes
of pay-
ment.

Fee fund.

As regards the payment of the Army, Navy, and Ordnance it had become the custom to issue on demand to the Paymaster of the Forces, and the Treasurers of the Navy and Ordnance, the sums voted by Parliament for those services. The money remained in the hands of these officers till it was wanted, and the delay in rendering any account of its expenditure took away all semblance of Treasury control.

While Henry Fox, Lord Holland, was Paymaster of the Forces, from 1757-1763, there passed through his hands more than forty-five millions of the public money. For fifteen years after he had left office he or his representatives retained a balance, unaudited and unaccounted for, of £475,000. This sum was retained in view of possible claims which might be made upon Lord Holland by sub-accountants to whom the money might be due. It was in fact money voted by Parliament, and either not spent or not claimed by those who were entitled to it. Under such a system the auditors of impost, even if they had been zealous in their vocation, might have found obstacles in their path. In this, as in other matters, the turning-point in the financial history of the last two hundred years is to be found in the appointment of the Committee of Public Accounts, which reported at intervals from 1780-1786, and in the contemporary legislation initiated by Mr. Burke.

By Acts passed in 1782-1783 the abuses of the Pay Office were corrected, and a minister was no longer allowed to make a profit out of money granted for the public use.

At the same time began the gradual abolition of the practice of paying public servants by fees extracted from the pockets of those who had to do business with the departments of government, or by percentages on money on its way from the Exchequer to the payee.

The process of change in this respect seems to have been, first, the creation of a fee fund, consisting of the fees formerly paid to individuals and forming the fund out of which the salaries of the department should be paid,

and then the payment of this fee fund into the general account of the Exchequer when the salaries became a fixed charge on the Consolidated Fund, or a charge annually appearing on the votes—*Consolidated Fund Services* or *Supply Services*. Fixed salaries.

A better system of issue and audit made it more and more difficult for a public servant to make use of public money as it passed through his hands. The only persons who now get any benefit from the public money on its way from the pocket of the taxpayer to the pocket of the individual to whom Parliament has appropriated it, are the shareholders of the Bank of England, who enjoy the use of the Government balance in return for the service rendered as bankers by the Governor and Company of the Bank.

The Civil List.

Fees and percentages formed one mode of remunerating public servants; but their more regular emoluments were a charge upon the Civil List.

The Civil List is a term used sometimes to mean the annual income granted to the Sovereign to meet certain charges, sometimes to mean the charges thrown upon this income. Meaning of 'Civil List.'

It originally meant the whole charge for civil expenditure, and to meet this charge the Commons in 1689 appropriated £600,000 out of the entire revenue of the country, including the hereditary revenues of the Crown, which at that time were estimated to produce about £300,000 a year. The charges on this fund consisted of the cost of the royal household, palaces, and gardens, the salaries of foreign ministers, of the judges, and of the civil service at home, together with pensions granted in this or the preceding reigns¹. Included all civil expenditure.

¹ A list of these charges is to be found in *Parl. Hist.* vol. v. App. xix, and in the *Report of 1869*, ii. p. 586.

Amount of civil list. The sums which came to the Crown for these purposes may be worth stating here ¹.

	1701. William III. £	1713. Anne. £	1726. George I. £
Hereditary and Temporary Excise	413,075	439,008	513,703
Post Office	75,258	92,008	95,273
Hereditary Revenue, small branches	55,141	45,271	71,131
Additional Subsidy of tunnage and poundage	297,070	253,679	279,142
Tax on Salaries (6d. in the £)	2,095
Grant from Aggregate Fund	120,000
	840,544	829,966	1,081,344

Deductions.

From these totals some deductions have to be made. The financiers of the last century were wont to appropriate certain taxes to certain services, and then take part of them for other services. Thus they took £3,700 a week from the Excise produce, and another £700 from that of the Post Office, and applied it to general revenue. So the civil list income of Anne was not more than £590,000 in 1713, nor that of George I more than £813,844 in 1726.

George II. When George II came to the throne Parliament guaranteed him an income of £800,000 a year if the hereditary revenues together with those provided by Parliament fell short of that sum; but the King was to take the benefit of any surplus which might accrue.

Thus when George III came to the throne provision for the Civil List had been made from three sources: the hereditary revenues, the additional taxes appropriated to the Civil List by Parliament, and a further sum which Parliament might be called upon to furnish if the two previous items did not amount to £800,000.

George III.

George III surrendered to the country the hereditary revenues arising from the Crown lands, the Excise, and the Post Office. Parliament in return granted him an income of £800,000 a year. The King retained some small branches

¹ Report, 1869, ii. pp. 594, 595, 597.

of hereditary revenue in England, and the hereditary revenues in Scotland and Ireland, and from time to time the amount of the income was increased by Parliament. But in spite of this, and in spite of a household economy which was almost penurious, the Civil List was frequently in debt.

Its insolvency gave Parliament an opportunity of regulating its expenditure. This was first attempted in 1782. The Civil List was divided into classes to be paid in a prescribed order:—

1. Pensions and allowances to the Royal family.
2. Salaries of Lord Chancellor, Judges, and Speaker.
3. Salaries of ministers resident at foreign Courts.
4. Tradesmen's bills of the Household.
5. Salaries of menial servants of the Household.
6. Pensions.
7. Other salaries payable out of revenues of the Civil List.
8. Salaries and pensions of the Commissioners of the Treasury and Chancellor of the Exchequer.

Regu-
lation of
Civil List,
1782.

The Treasury was given a practical interest in the receipts and payments of the Civil List. Its officers came last, so that unless there was vigilance over income and economy in expenditure they would not get paid at all.

In 1816 various payments to members of the royal family were transferred from the Civil List to the Consolidated Fund. George IV surrendered to Parliament the hereditary revenues of England and Ireland. William IV surrendered in addition the hereditary revenues of Scotland, besides certain Admiralty and Colonial sources of income. In settling the Civil List for William IV it was relieved of all public charges except £23,000 for secret service money. This practice has been carried further in the present reign. The pay of public servants is now wholly removed from the Civil List, and appears on the votes or is charged on the Consolidated Fund, and their number and salaries are brought by various statutes under State control.

Transfer
of charges
from it.

The
present
Civil List.

The payments on the Civil List are now as follows :—

	£
For Her Majesty's Privy Purse	60,000
Salaries of the Household and retired allowances	131,260
Expenses of the Household	172,500
Royal Bounty and Alms	13,200
Unappropriated	8,040
Pensions which may be granted in each year to the extent of £1,200,	about 25,000
	<u>410,000</u>

The Civil List accounts are not audited by the Comptroller and Auditor-General except the *item* of pensions. There is an Auditor of the Civil List, usually one of the principal clerks of the Treasury. With this trifling exception the whole expenditure of the country is supervised and controlled by the Treasury in the interests of Parliament and the taxpayer rather than of the Crown. For Parliament not only determines how much shall be spent on the public service, but in what manner it shall be spent. And it is the business of the Treasury to take heed, firstly, by supervision of the estimates that the demands made upon Parliament by the Queen's ministers are not excessive, and secondly, that the directions of Parliament as to issue and expenditure of public money are exactly fulfilled by the departments concerned. And in this last respect if we ask : ' Quis custodiet ipsos custodes ? ' the answer is prompt and effective, ' The Comptroller and Auditor-General.'

CHAPTER VIII.

THE ARMED FORCES OF THE CROWN.

THIS chapter has to do with the land and sea forces of the Crown ; it would seem to fall into two sections, the first dealing with the mode in which these forces are composed and disciplined, and with the consequent *status* of soldier and sailor, the second dealing with the constitution of those departments of the central executive by which Army and Navy are governed. In both sections a brief historical outline will be necessary. The sections may be called respectively, (1) the Army and Navy, (2) the War Office and Admiralty.

SECTION I.

THE ARMY AND NAVY.

§ 1. *History of the Military Forces.*

Our military forces have varied in character, and their history falls into two distinct periods, divided by the Commonwealth. During the first of these there were two recognized forces, the feudal levy and the national levy : in addition to these the Crown was ever striving to possess itself of a third force, which should not be limited in its liability to service either by time, like the feudal levy, or as to place, like the national levy.

The Feudal Levy.

The feudal levy though not the oldest may be dealt with first and briefly. It was the force which the King could raise by calling on tenants in chivalry to discharge the obligations

of their tenure. It was a cavalry force, limited in its liability to service to forty days in the year¹. When summoned, it was summoned like the *Commune Concilium* of the Charter: the great barons received a special writ, the lesser tenants-in-chief were summoned through the sheriff². In 1159 this service was commuted for a payment of two marks on the knight's fee. Henceforth the money commutation became usual, until by the end of the fourteenth century it had fallen into disuse³. In 1661 military tenures were abolished⁴; they had long possessed, in their burdensome incidents, a merely historical connection with military service, and with their abolition the feudal levy became impossible.

The National Levy.

The *fyrð*: The Saxon *fyrð* was a part of the *trinoda necessitas* which rested on all lands: it was the liability of every landowner to be prepared for summons to watch and ward. This defensive force was organized by Henry II in the Assize of Arms, and the Assize of Arms was in turn adapted to the circumstances of the time by the Statute of Winchester (13 Ed. I). It existed for the maintenance of civil order and for purposes of military defence. It might be called out to suppress riot and pursue criminals, or to defend the country in case of invasion.

its liabilities

and uses. The sheriff was responsible for its efficiency and summons; it was essentially a county force, not bound to service beyond the county except in case of invasion⁵.

Liabilities annulled as to arms, The lieutenant of the county was substituted for the sheriff in the discharge of this duty, by 3 & 4 Ed. VI, c. 5, which required all officers and inhabitants of the county to attend this new officer when required, for the suppression of riot or rebellion. In the fourth year of Mary's reign the laws

¹ This is the term of service usually stated (Blackstone, Comm. ii. 75); but Dr. Stubbs says that 'from the statement contained in the writ of summons we get a somewhat indistinct idea of the limits of the feudal obligation'; Const. Hist. ii. 279.

² Ibid. 278.

³ Stubbs, Const. Hist. ii. 521.

⁴ 12 Car. II, c. 24.

⁵ This point, which had been disputed in the fourteenth century, was settled by Statute in 1402; 4 Hen. IV, c. 13.

relating to the liability to keep arms and serve were consolidated¹, but in the reign of James I these Statutes of Armour were wholly repealed².

Nevertheless, though the requirements as to maintenance of arms and equipment were cancelled, the general liability to military service remained, and the appointment of the lieutenants of counties, in whose control it lay, was the final cause of rupture between Charles I and the Long Parliament.

Armies before the Commonwealth.

But the levy for defensive purposes did not satisfy the requirements of Kings who wanted a force available at once anywhere, and for any time. Three modes were adopted for raising such a force as the King might need. The liability to military service was used as a means of collecting a force, sometimes under pressure by Commissioners of Array, and the force, when collected, was used not merely to resist invasion from Scotland, but for foreign war. This was frequently done by Edward I, who paid the levies for their service, and by Edward II, who threw the charge on the townships and counties whence the men came³. Such a practice was declared illegal by a series of Statutes from 1349 to 1402, and the law was then clear:—that no man could be constrained to find men-at-arms or archers unless he held his lands on the terms of such service, or else by force of grant and assent in Parliament; that no man could be required to serve out of his own county except in case of invasion; that volunteers who served the King abroad should do so at the King's cost.

The armies of Henry V were mainly composed of troops hired by the King himself, or raised by lords under indentures made with the King⁴. The Yorkist and Tudor Kings made pretext of invasion from Scotland to send Commissions of

¹ 4 & 5 Ph. & M. c. 2.

² 1 Jac. I, c. 25, s. 7; 21 Jac. I, c. 28, s. 11, sub-s. 44.

³ Stubbs, Const. Hist. ii. 284, 285.

⁴ Ibid. iii. 540.

Impressment.

Array into the counties and call on men to serve without consent of Parliament or payment by the Crown. The step onwards to impressment was easy. The Tudors and Stuarts clearly regarded it as a prerogative of the Crown¹. The Statute 16 Car. I, c. 28, declared impressment, or compulsion to serve outside the county, to be illegal, 'save in case of necessity of invasion or by reason of tenure.'

Billeting.

But, even if the King could manage to collect troops and could afford to pay them, they needed to be fed, lodged, and kept under discipline. The Petition of Right made it illegal to quarter troops upon householders, and to issue commissions 'giving power and authority to proceed within the land according to the justice of martial law².'

Discipline.

Difficulty of raising

After the Restoration and the abolition of military tenures, the national levy remained the only lawful armed force in the country. The King might raise troops by contract or voluntary enlistment, if he could afford to pay them, or if Parliament would grant him the necessary funds, but the maintenance of discipline was rendered practically impossible, because, unless troops were on actual service in war, the law permitted no departure from the settled rules which protected the liberty of the subject.

and keeping an army.

Character of objections.

And the objections to the maintenance of a standing army had widened in character. Before the Commonwealth the requirements of military service had been regarded as oppressive to those who were required to serve; it was hard for the citizen to be made a soldier against his will. Cromwell had taught the people that a standing army might be dangerous to national freedom. Henceforth the objections to a standing

¹ 35 Eliz. c. 4 provides for the relief of soldiers disabled after being 'pressed and in paye for her Majesties service.' See, too, a reference to Shakespeare, Henry IV. Part i. Act iv. s. 2, in the Manual of Military Law published for the use of the War Office, a work of which I have made much use in this chapter.

² 3 Car. I, c. i. ss. 6, 7. The matters complained of seem to be an extension of the right of *purveyance*, which, after restraint by many Acts, was abolished by 12 Car. II, c. 24, s. 12. See Stubbs, Const. Hist. ii. 285, 535.

army are not so much that it involves hardship to the men who compose it, as that it is an instrument of despotism. The soldier is no longer an injured citizen, he is a danger to the state.

When the army of the Commonwealth was disbanded the King was permitted to retain guards for his personal attendance, and garrisons for the fortified places in the country¹. Charles II and James II availed themselves of this permission to maintain considerable bodies of troops, and the government of their guards and garrisons was regulated by Articles wherein offences deserving death were reserved for trial by the ordinary courts². But their armies were the subject of remonstrance and suspicion; and when the Crown was offered to William and Mary, the Declaration of Rights laid down and the Bill of Rights enacted that—

Armies
after the
Restora-
tion.

The maintenance of a standing army in time of peace without consent of Parliament is contrary to law.

There are then three obstacles to the maintenance of a standing army by the Crown without consent of Parliament. It is unlawful in time of peace; the necessary rules of discipline involve a departure from the ordinary law; and under the existing method of granting supplies, the money needful to pay the troops would not be forthcoming.

The three
obstacles.

But a standing army is required for our national security. It has therefore been legalized within the United Kingdom every year, for a year, with few breaks³, since 1689. This is done by the annual Mutiny Act, called since 1881 the Army

The
Mutiny
Act.

¹ As to the Ordnance, see post, pp. 376, 377, and Clode, *Military Forces of the Crown*, chapters i, xx.

² *Manual of Military Law*, p. 13. See too a letter from the Secretary at War to Col. Kirke, July 21, 1685, containing a direction that in all cases whatsoever where the punishment is to be loss of life or limb, the trial of any offender in His Majesty's pay 'be left to the Common Statute Law,' the Articles of War being only to take place during the Rebellion that has now ceased. Clode, i. 478.

³ The gaps in the series of Mutiny Acts are, 1689, 8 days; 1690, 2 months 20 days; 1698, 2 years 10 months; 1711, 4 months; 1713, 2 months 10 days. Clode, i. 390.

Act, which also makes provision for the maintenance of discipline, continuously in the Regular forces, and in the Auxiliary forces at certain times and under certain conditions of service.

§ 2. *The Composition of the Military Forces.*

The
regular
forces.

The military forces of the Crown consist of the *Regular* forces and the *Auxiliary* forces: of the latter I will speak presently. The regular forces again are divided into Indian, Colonial, and British.

Indian,

The Indian forces consist mainly of natives of India, but partly also of British officers and men serving in India. The latter are governed by the Army Act, 1881, the former by Articles of War made by the Indian Government¹.

Colonial,

The Colonial forces may be (1) 'forces raised by order of Her Majesty beyond the limits of the United Kingdom and India'²—these are substantially part of the regular forces and are governed by the Army Act—and (2) forces raised by the Government of a colony; these are subject to Colonial law: they only fall under the Army Act when serving with the regular forces, and then only so far as Colonial law may have failed to provide for their government and discipline³.

(a) *The Regular Forces.*

British.

But the British forces are, for our present purposes, the most important. They consist of the Army, including the Reserves, and the Royal Marines. The Army consists of cavalry, artillery, engineers, and infantry, besides what are called 'departmental corps,' such as the Commissariat and Transport Corps⁴. The Royal Marines are a force of infantry and

¹ Indian military law does not apply to British-born subjects nor to their lineal Christian descendants in the male or female line. See Indian Articles of War, 1869; Acts of Governor-General in Council, No. 5.

² 44 & 45 Vict. c. 58, s. 176 (Army Act, 1881). Such forces are the West India Regiments and the Malta Fencibles.

³ Ibid. s. 177.

⁴ The departmental corps are the Commissariat and Transport Corps, the Corps of School of Musketry, of Armourer Sergeants, of Military Staff Clerks, of Army Schoolmasters, of Military Mounted Police, of Military Foot Police, of Ordnance Artificers, the Ordnance Store Corps, and the Post Office Corps.

artillery, first raised in 1755. Their mode of enlistment and terms of service correspond with those of the soldier, and when they are not serving on board ship their discipline is provided for by the Army Act. But the force is under the control of the Admiralty; its numbers are not fixed in the Army Act like those of the regular army, but appear on the votes which the House of Commons is asked to grant in Committee of Supply.

This brings us to the first point to note in respect of the regular army. Its numbers are fixed in the Army Act for each year, which, after reciting the necessity for maintaining a body of forces, states the precise number of men of which the force should consist, '*exclusive of the numbers actually serving within Her Majesty's Indian possessions.*'

Its numbers; how limited.

That this limitation of numbers may become of practical importance is shown by the vehement discussion which arose when, in 1878, Indian troops were ordered to Malta, and the right of the Crown to employ these troops outside India in time of peace was disputed.

The Indian troops at Malta.

It was argued that a force of a certain number of men was adjudged necessary by Parliament 'for the safety of the United Kingdom and the defence of Her Majesty's possessions,' that the Indian troops were recognized as an additional force, 'actually serving within Her Majesty's Indian possessions,' and that if the Queen might employ these troops elsewhere in her dominions, consistently with the terms of the Mutiny Act, there was no reason why she should not raise within her Indian possessions an army unlimited by statute as to number, an army which 'she might move and dispose of without reference to Parliament¹.'

The practical restriction on such an employment of the Indian army seems to be a clause in the Act for the government of India which forbids the expenditure of the revenues of India on military operations beyond the frontier of India, except in case of urgent necessity, without the consent of

¹ Hansard, cexl. 194.

Parliament¹. Thus, a ministry which employs Indian troops outside India must in the end ask Parliament either to find the money or to allow the Indian Government to do so, and must then justify its action.

It is clear that to introduce such troops into the United Kingdom in time of peace without consent of Parliament would be unlawful, because the Army Act suspends the operation of the Bill of Rights only to the extent of the number of troops expressly provided by the Act. But the right of the Crown to dispose of this force freely elsewhere than in the United Kingdom must be regarded as an open question, since the highest legal authorities differed irreconcilably on this point in 1878².

Modes of
raising
troops.

We have now to consider how the number of troops sanctioned by Parliament is raised by the Crown.

Before 1783 this was effected by an arrangement between the colonels of regiments and the Crown. The colonel was empowered to raise recruits, and was bound to keep up the numbers of the regiment. He received a portion of the sum granted by Parliament, and made his own terms with the men³. This practice was abolished in 1783⁴, when the Government took into its own hands the business of recruiting and the payment of the troops⁵.

The term of service for the rank and file has varied. Until a standing army was recognized by Parliament the engagement was for the war on hand. After that it was for life,

¹ 21 & 22 Vict. c. 106, s. 55.

² See the speeches of Lords Selborne and Cairns, of Sir John Holker and Mr. Herschell; Hansard, ccli. 187, 213, 369, 515.

³ Clode, *Military Forces of the Crown*, i. 74; ii. 2-6.

⁴ 23 Geo. III, c. 50.

⁵ In time of war, even as late as 1854, noblemen and gentlemen agreed with the Crown to raise corps, on the terms that they obtained the nomination of some of the officers. Clode, ii. 5, 6. The practice would seem to have come from the time when lords and great men raised troops under indentures made with the King, as in the wars of Edward III and Henry V. Something of the sort prevailed under the Tudors. We find in the Acts of the Privy Council [iv. p. 132, Sept. 30, 1552] an entry of payments for bands of horsemen maintained by great nobles.

unless the Crown discharged the soldier. Since 1847 service has been limited. Infantry were then engaged for ten years, cavalry for twelve, but the soldier might re-engage himself up to a term of twenty-one or twenty-four years.

The terms of enlistment have been varied by Acts of 1867, 1870, and 1879, as to re-engagement, forfeiture of service for misconduct, and liability to transfer from one corps to another: but enlistment is an engagement between the soldier and the Crown, and the soldier is entitled to the observance of the terms under which he enlisted, though these may have since been changed by Statute. Enlistment: its terms ;

This engagement is made not by acceptance of 'the Queen's shilling,' but by attestation before a justice of the peace. The recruiting officer gives to the man who offers to enlist a form stating the terms of enlistment and the time and place at which he should appear before a magistrate. If, when he appears, he answers certain questions set forth in an attestation paper (the magistrate taking care that he understands their purport), signs a declaration as to the truth of his answers, and takes the oath of allegiance, he is then a soldier. The attestation has been required since 1694¹, to ensure that the recruit understands the nature of his engagement ; but he may still claim his discharge, if he change his mind within three months, on payment of a sum not exceeding £10. After that date he is bound to serve his time ; but the Crown may discharge him at any time in virtue of its prerogative, or a competent military authority may do so under statutory power². its forms.
engages for a term :

An officer in the army or navy becomes such by the receipt of the Queen's commission ; he thereupon places himself at the disposal of the Crown ; he cannot resign his commission without leave, and he is liable to be discharged at pleasure. officer during Queen's pleasure.

The question of the right to resign at will has arisen in the

¹ 5 & 6 Will. & Mary, c. 15, s. 2.

² For the forms of enlistment, see 44 & 45 Vict. c. 58, s. 80 ; for power to discharge, s. 92.

case of a military officer in the service of the East India Company (1769) and of an officer in the Navy (1887). In the former Lord Mansfield said, 'upon the general abstract question we are all of opinion that a military officer in the service of the East India Company has not a right to resign his commission at all times and under any circumstances whatsoever whenever he pleases¹.'

Case of
Lieut.
Hall.

In the recent case *ex parte Cuming*², Lieutenant Hall, a lieutenant in the Navy, serving on one of the Queen's ships in commission, having asked leave of the Admiralty to resign his commission and having been refused, left his ship, sent his commission to his captain with an announcement of his intention to retire, and took a passage home in a mail steamer. On his arrival in England he was arrested by Captain Cuming, and detained as a prisoner with a view to his being tried before a court-martial, under the Naval Discipline Act³. Captain Cuming was called on to show cause why a writ of *habeas corpus* should not issue and Hall be discharged. The Court held that Lieutenant Hall could not resign his commission in the mode which he attempted, and that he was rightly in custody.

'It is not necessary for us to decide the very grave question whether the mere acceptance of a commission would of itself and under all circumstances suffice to bring an officer within the jurisdiction of a court-martial for refusing to enter upon any particular service. Some of us as at present advised are of opinion that it would not. We leave the question distinctly open to be argued and decided if it should in any case hereafter be necessary to decide it. But we are clearly of opinion that, where a commissioned officer accepts an appointment to serve in one of Her Majesty's ships in commission, and enters upon the performance of his duties, he subjects himself to the provisions of the Naval Discipline Act, and cannot at his own will and pleasure resign his appointment, and may be tried by Court-martial for any of the offences specified in the Act.'

¹ *Vertue v. Lord Clive*, 4 Burr. 2472.

² 19 Q. B. D. 13.

³ 29 & 30 Vict. c. 109, s. 19.

(b) *The Auxiliary Forces.*

The Auxiliary forces consist of the Militia, the Yeomanry, and the Volunteers.

The Militia represents the general levy, the control of which Militia force, together with the appointments of lieutenants of counties, proved the final cause of quarrel between Charles I and the Long Parliament. The Restoration Parliament was careful to recognize the right of the king to the command of the Militia¹; but it also required him to appoint lieutenants of counties throughout the kingdom, with power to commission officers, raise men, and organize training. Under these Acts the supply of men, horses, and arms was a liability resting on property: and the practical control was vested in the Lord-Lieutenant². after the Restoration:

When Mutiny Acts were passed, the Militia was exempt from them, and the force fell into inefficiency until its revival in 1757. In that year the old law was greatly changed. after 1757: The liability to provide for the Militia became local. The Act required that a certain number of men should be raised from each county; lists of all the men in each parish between the ages of 18 and 60 were sent to the Lord-Lieutenant of the county. The quota of each district was settled and the men who should serve were chosen by ballot.

After the peace of 1815 the liability was relaxed. From 1829 onwards the ballot has been suspended by Statute, unless the Queen should by Order in Council put it in force, and the Militia was re-constituted on a different footing in 1852.

It is now raised by voluntary enlistment, the ballot being kept in reserve in case the number of men provided by Parliament should not be forthcoming³. Since 1871 it has been placed under the control of the Secretary of State, who is responsible for the exercise of the powers of the Crown as since 1852:

¹ 13 Car. II, st. 1. c. 6.² 14 Car. II, c. 3; 15 Car. II, c. 4.³ 23 & 24 Vict. c. 120.

regards the government, pay, and discipline of the Militia¹. The Lieutenants of the counties only retain the right to nominate to first commissions. The Militia Act of 1882² has consolidated most of the enactments which affect the force.

present
liabilities.

What then are now the liabilities of the Militia? Enlistment takes place in the same manner as that of the regular soldier. The recruit is required to undergo a preliminary training fixed by the regulations, and a subsequent training of from 21 to 28 days. The Queen may by Order in Council cause the Militia to be embodied in case of grave national danger, but the militiaman cannot be required to serve out of the United Kingdom. Parliament, if not sitting, must be summoned to meet within ten days of such embodiment. When acting with the regular forces in their training or during embodiment the militiaman is subject to military law. The militia officer is always so subject.

Yeomanry
and
Volun-
teers.

The Yeomanry and the Volunteers are alike in that they are bodies of volunteer troops, unlimited as to number, that the Crown is empowered by Statute³ to accept their services, and that they are liable to be called out for military service in Great Britain in case of actual or apprehended invasion. But the Yeomanry is a cavalry force, the Volunteers are composed in part of light horse, artillery, and engineers, but mainly of riflemen. The Yeomanry are required to train for a certain number of days in each year in order to be effective: and during that time are subject to military law. The Volunteers are only subject to military law while being exercised with regular troops or with the Militia when the latter are so subject⁴. The Yeomanry may be called upon to suppress a riot: not so the Volunteers. Neither Yeomanry nor Volunteers exist in Ireland.

¹ 34 & 35 Vict. c. 86, Part ii.

² 45 & 46 Vict. c. 49.

³ 44 Geo. III, c. 54. The Act applies to volunteer infantry, but was repealed as to these by the Act of 1863 (26 & 27 Vict. c. 65), which with the Regulation of Forces Act 1881 (44 & 45 Vict. c. 57, s. 9) governs the Volunteer Corps.

⁴ 44 & 45 Vict. c. 58, s. 176.

(c) *The discipline of the Army.*

Troops on active service were from an early date in our history governed by Articles of War, issued by the King himself or by an officer commissioned by him. They were administered in the Court of the Constable and Marshal, ^{Articles of war.} which, as Hale tells us¹,

‘Dealt with the offences and miscarriages of soldiers contrary to the laws and rules of the army: for always *preparatory to an actual war* the Kings of this realm by advice of the Constable and Marshal were used to compose a book of rules and orders for the due order and discipline of their officers and soldiers together with certain penalties on the offenders; and this was called Martial Law.’

This jurisdiction was probably exercised by officers in military command in virtue of commissions from the Crown, and was unaffected when the office of High Constable became extinct; from these commissions grew the courts for dealing with offences so created, which we know as *Courts-martial*. ^{Courts-martial.}

But Articles of War, as is indicated by the words in italics, were only in force in actual war. When a military force was made lawful by the Mutiny Acts it was necessary to secure discipline under all conditions of active service, war, or peace. For insubordination there was no remedy except when troops were on active service in time of war, and though desertion had been made a felony in the case of men under contract or indenture to serve the Crown², the deserter could be punished only in the civil courts. ^{The royal prerogative;}

The first Mutiny Acts were intended to do no more than supplement the prerogative right to make articles of war *in time of war*; they made mutiny and desertion punishable with death, and gave a statutory power to the Crown to commission courts-martial to deal with such offences in the case of troops ^{how extended by Mutiny Acts.}

¹ Hale, *History of the Common Law*, 40.

² 7 Hen. VII, c. 1, s. 2; 3 Hen. VIII, c. 5; 4 & 5 Ph. & Mary, c. 3, s. 9.

not on active service. But they did not give the King power to make articles of war, that is a special code of offences and punishments, beyond his existing prerogative. But the Mutiny Acts of 1715 and subsequent years gave power to the King to make articles of war for the troops in the United Kingdom and in his other dominions *in time of peace*; and after 1803 this power was extended to troops outside the dominions of the Crown, and so covered the case of troops on active service.

Thus the prerogative of the Crown was completely covered by the statutory powers conferred by the Mutiny Acts, and in virtue of these powers were articles of war made and enforced in peace and war until 1879.

The Army
Act.

In that year the provisions of the Mutiny Act and of the Articles of War were consolidated into a code of military law¹. This code was amended in 1881 and is now re-enacted every year, for one year, under the title of the Army Act². It is worth while to note some features of this Act.

(1) The preamble recites the clause of the Bill of Rights directed against the raising or keeping a standing army in the time of peace, and proceeds to recite the necessity, for the safety of the United Kingdom and the defence of the possessions of Her Majesty's Crown, that a body of forces should be continued, and that it should be of a certain number [155,403 for 1895], and also a body of marines.

(2) It then recites the provisions of mediaeval statutes that 'no man can be forejudged of life or limb or subjected in time of peace to any kind of punishment within this realm by martial law, or in any other manner than by the judgement of his peers and according to the known and established

¹ For an account of the circumstances which led to this codification of military law, see the speech of Colonel Stanley introducing the Bill. Hansard, cccxliii. 1910.

² The effect of the substitution of the present Army Act for the old Mutiny Act is to bring the entire code of military law annually under the consideration of Parliament, which no longer gives power to make rules and constitute Courts, but enacts the rules, provides the jurisdiction for enforcing them, and the punishments for their breach.

laws of the realm,' and proceeds to state the necessity 'for retaining the *before-mentioned forces and other persons subject to military law* in their duty that an exact discipline be observed,' and that persons who act to the prejudice of good order and military discipline 'be brought to a more exemplary and speedy punishment than the usual forms of the law will allow.'

(3) It then re-enacts the Army Act of 1881 for specified times throughout the entirety of the Queen's dominions.

(4) The Act applies to all persons subject to *military law*, and these are not limited to the number of men specified in the preamble. They include the marines when not subject to the 'laws relating to the government of Her Majesty's forces at sea,' the British troops serving in India, and, under special circumstances mentioned above, the Militia, Yeomanry, Volunteers, and the Colonial troops.

Persons to whom it applies.

§ 3. *The Composition and discipline of the Navy.*

The navy, unlike the army, has never been suspected by the Legislature. Its existence has been taken for granted. The maintenance of its numbers by the arbitrary mode of impressment has never been declared unlawful: though the prerogative may be only exercised in respect of seafaring men, and would probably be called in question if exercised at the present day. The numbers of the naval force are therefore determined by the requirements of the Admiralty, sanctioned by the Chancellor of the Exchequer, and met by vote of the House of Commons.

Numbers of Naval force: how settled.

Like the soldier, the sailor engages himself to the service of the Crown for a certain time, but may be dismissed before that time has expired.

Terms of service.

The officer in the navy, like the officer in the army, when he accepts the Queen's commission, places himself at the disposal of the Crown; his services may be dispensed with, but he cannot terminate them at his own pleasure.

The discipline of the navy was maintained, in its origin, by

Provisions for discipline. orders issued from time to time by the admiral of the fleet in virtue of royal orders or a royal commission. The first Lord High Admiral of England was Sir Thomas Beaufort in 1408. Until that time the command of the various fleets had not been entrusted to one man, nor indeed was the fleet a regularly organized institution. The Cinque Ports were liable for the defence of the narrow seas, and beyond this, fleets were collected, manned and disciplined, as occasion might require.

The jurisdiction of the Lord High Admiral and his Court may be dealt with hereafter; it is wholly distinct from the code of rules passed for the maintenance of discipline.

Royal prerogative. Under the Tudors the navy became a permanent force, belonging to the Crown and governed by the Crown. In the reign of Charles I the office of Lord High Admiral was for the first time put into commission. The sailors who manned the fleet were governed by regulations made by the admiral in command, enforced by the captains under his instructions, and neither seen nor approved by Parliament.

The first attempt to organize the discipline of the navy was made by the Long Parliament¹: and under the Commonwealth ordinances were drawn up and the constitution of naval Courts-martial was carefully framed so as to include all ranks².

Parliamentary control. After the Restoration, Parliament retained its control over naval discipline. In 1661 was passed an Act for establishing discipline in the navy. The Act³ defines a number of offences and their punishments, and gives power to the Lord High Admiral to issue commissions for holding Courts-martial, limiting the jurisdiction to offences on the high seas, or in great rivers below bridges, committed by persons in actual service in the King's fleet. In 1748 and 1749 these rules were amended in some respects, and extended to shipwrecked crews, and to offences under the Acts committed on shore out of the dominions of the Crown. Changes have been made from time to time in this code of discipline and procedure for

¹ Lords' Journals, vii. 255. ² Thring, Criminal Law of the Navy, 32.

³ 13 Car. II, c. 9.

the navy, but as a whole it has remained a permanent Statute. Parliament has never feared to contemplate the continued existence of the navy, and hence the contrast between the temporary character of the Mutiny Act and the permanence of the Naval Discipline Act. The law which now governs the navy is the Naval Discipline Act of 1866. Part I of this Act is described as consisting of *articles of war*; a sailor therefore, like a soldier, may be regarded as a person subject to military law.

29 & 30
Vict.
c. 109.

§ 4. *Persons subject to Military Law.*

The soldier and sailor alike are subject to the ordinary law of the land. While within the jurisdiction of the ordinary courts they can be tried and punished for offences against the criminal law, they can be sued for liabilities¹ incurred under the civil law, and they acquire no immunity by reason of their engagement in the service of the Crown.

Liabilities
of soldier
and sailor

But the criminal law of this country follows them into places where it would not reach other subjects of the Crown: for it may be administered by courts-martial within and without the jurisdiction of the Courts. This power of administering the ordinary criminal law is limited by the rules that certain offences may not under any circumstances be tried by Court-martial, if committed out of the United Kingdom but within the dominions of the Crown, unless the offender is on active service or the offence be committed 100 miles or more from a competent civil court: and that under no circumstances can a Court-martial oust the jurisdiction of the civil courts over such offences.

to
criminal
law,

And in addition to a liability to the criminal law of the land, which is more extensive than that of the citizen, the Army Act and the Naval Discipline Act provide for the soldier and

to military
law,

¹ But the soldier cannot be arrested or compelled to appear before a court on account of any debt, damages, or sum of money under £30. The creditor may sue and get execution of the soldier's goods so long as he does not deprive the Crown of the soldier's services or 'touch the person, pay or military equipment of the soldier.' *Manual of Military Law*, 287.

the sailor rules of conduct and a procedure for their enforcement different in character to the rules and procedure of the ordinary law.

The soldier and sailor are therefore *persons subject to military law*. They are liable to arrest and confinement on being charged with an offence against that law, and pending investigation, and if below a certain rank in either service, may be punished for minor offences under summary powers possessed by officers in command¹.

Courts-martial.

For offences against military law they are triable by Courts-martial; the offences so triable and the procedure in respect of them are carefully defined in the Acts to which I have referred. But Courts-martial are strictly limited to the powers conferred upon them by Statute, and the relation of the Law Courts to them in this respect must be noted.

Securities

Persons administering military law may exceed their jurisdiction in two ways. They may apply military law to persons not subject to that law. Or they may misapply military law in cases of persons who are subject to it, as if a soldier were tried by Court-martial for murder in the United Kingdom, or the sentence of a Court-martial were confirmed by an officer who had no authority to confirm it.

against
excess of
jurisdiction ;

The remedies for such excess of jurisdiction are by writs of Prohibition, of Certiorari, of Habeas Corpus, issuing from the High Court of Justice. The holding of a trial or the infliction of a sentence may be restrained by a writ of Prohibition, a sentence may be quashed or a matter brought up to the High Court to be dealt with by writ of Certiorari; one who is deprived of his liberty wrongfully may recover it by writ of Habeas Corpus. Beyond this the Courts will give a remedy in damages to persons who have suffered by the application of military law without jurisdiction.

¹ This power exists as to soldiers partly under s. 45 of the Army Act, partly under the Queen's Regulations in respect of minor punishments, such as confinement to barracks, &c. As to sailors, it appears to be authorized by the Naval Discipline Act, s. 52 (11) and s. 53.

The cases may be thus grouped under three heads : (1) the case of a civilian tried and punished by military law, (2) the case of a person subject to military law punished without trial or tried and punished without jurisdiction, and (3) cases in which jurisdiction exists but the plaintiff alleges that the law has been put in force against him either without reasonable cause or wrongfully and maliciously.

As regards these last it is well to seek some general rule, and the rule may be thus stated. Where an officer in the exercise of his discretion and in the course of his duty brings, before a military tribunal, a person who is subject to military law, Courts of law will not inquire into the reasonableness of the charge, even though it should have been proved at the trial to be unfounded. against
exercise of
jurisdiction

without
cause.

Captain Sutton was ordered by his commanding officer, Commodore Johnstone, when in sight of the enemy, to slip his cable and engage the French fleet. He disobeyed this order, and Johnstone brought him before a Court-martial. It was there proved that his disobedience was not wilful but arose from the condition of his ship, which made his obedience to the order a physical impossibility. He was therefore honourably acquitted. He brought an action against Johnstone and obtained a verdict for £6,000 damages, which was sustained in the Court of Exchequer on a motion for arrest of judgement. But this decision was reversed in the Court of Exchequer Chamber, mainly on the ground that the defendant had 'probable cause' for bringing the plaintiff to trial. But the Court went further, and expressed an opinion that even if the proceedings in the Court-martial had been instituted without probable cause, Courts of law would not interfere with the discretion of an officer acting in a matter of discipline. Sutton v.
Johnstone¹.

It remains to consider the position of a person subject to military law against whom proceedings are instituted not merely without probable cause, but with malice. On this point we may state the law to be as follows. With
malice.

¹ 1 T. R. 541.

*Dawkins
v. Lord
Rokeby*¹.

The general rule which protects witnesses from action for defamatory statements made in the course of their evidence applies to evidence given before Courts-martial. And further, the Courts will not interfere even where the discretion of an officer has been influenced in its exercise by a malicious motive.

*Dawkins
v. Paulet*².

Lord F. Paulet in the course of his duty made statements concerning Colonel Dawkins which were intended to be forwarded to the Commander-in-Chief. Colonel Dawkins brought an action for defamation, alleging that these statements were not merely false but malicious. The case for the defence was argued upon a demurrer, that is to say, the truth of the allegations was not traversed, but it was maintained that they disclosed no cause of action. The majority of the Court held that the statements, being made in the course of military duty, were not actionable: but some weight was given to a provision in the articles of war³, that an officer who considers himself to be wronged might complain to the Commander-in-Chief. There was therefore a military remedy for the breach or mis-performance of a military duty. It may be open to question whether the Courts would not find a remedy for an abuse of military procedure which was proved or admitted to be malicious, if the Army Act and Naval Discipline Act had not provided one.

SECTION II.

THE WAR OFFICE AND THE ADMIRALTY.

§ 1. *The government of the army before 1855.*

Army
manage-
ment in
1850.

Before the Crimean war, and the changes in military administration to which that war gave rise, the control of the army, and of the appliances necessary to an army, exhibited

¹ L. R. 8 Q. B. 251; L. R. 7 H. L. 744.

² L. R. 5 Q. B. 94.

³ This provision is now introduced into the Army Act 44 & 45 Vict. c. 58, s. 42. It is to be found also in the Naval Discipline Act 29 & 30 Vict. c. 109, s. 37.

a medley of conflicting jurisdictions. The system was almost unmanageable in time of war, but was supposed, in its dispersion of duties and powers, to ensure that the army was not dangerous to the constitution.

The Commander-in-Chief was responsible to the Crown for the discipline of the army, for appointments, promotions, rewards and punishments. The Secretary at War, who was not a Secretary of State nor often a member of the Cabinet, was responsible to Parliament for the money voted for the army, for the security of the citizen against the soldier in person and property, for the security of the soldier in respect of the fairness of the rules of military discipline which were embodied or authorized in the Mutiny Act.

The Secretary of State for the Home Department was responsible for the Reserves and for the forces on the Home Establishment.

The Secretary of State for War and the Colonies was responsible for the numbers of the army, for the general policy respecting it, and for the movement of troops on foreign or colonial service.

The Ordnance Board was a separate department, represented in Parliament by the Master-General of the Ordnance, and responsible for the defences of the country, and for army and navy stores.

The Commissariat was a department of the Treasury.

The soldier, therefore, was fed by the Treasury and armed by the Ordnance Board: the Home Secretary was responsible for his movements in his native country: the Colonial Secretary superintended his movements abroad: the Secretary at War took care that he was paid, and was responsible for the lawful administration of the flogging which was provided for him by the Commander-in-Chief.

The confusion of authorities was partly due to the desire of the Crown to retain as a source of political influence the prerogatives which it enjoyed in respect of the standing army, but mainly to the halting and reluctant steps by which the

The Commander-in-Chief.

The Secretary at War.

The Home Office.

The War and Colonial Office.

The Ordnance Board.

The Treasury.

Causes of confusion.

country admitted the standing army as a part of its constitution. Any attempt by Ministers to harmonize these conflicting elements was liable to be met by objections from two quarters. The Crown was unwilling to subject its prerogatives to Parliamentary control; the Commons objected to the admission that a standing army was more than a temporary necessity.

But forasmuch as for 200 years Parliament has, with few breaks, legalized the existence of a standing army, provided for its discipline, voted money to pay for it, and taken care that this money is applied to the purposes for which it is voted, we may accept the army as a permanent institution, and ask, Who is responsible for its numbers and disposition, for the maintenance of its discipline, for asking Parliament for the necessary funds, and for their proper expenditure?

To reach, and to understand the present highly centralized organization of the War Office, we must work through the various departments which have been merged in it. They are four: the Ordnance Board; the Commissariat, as a branch of the Treasury; the office of Secretary at War; and that of Secretary of State, in so far as it was concerned with military matters.

(a) *The Ordnance Board.*

Duties of
the Board.

The Ordnance Board should come first, as being the oldest of the military departments¹. The *Ordnance* meant the defence of the country by means of fortresses, garrisons, and stores, these last being applicable alike to the army and navy. The right—the sole right—to maintain defensive works, such as castles and forts, was an undisputed branch of the royal prerogative: forts need guns, ammunition and men, and the employment of these was a part of the discretionary power vested in the Crown for national defence. The Board was wholly separate from and independent of the office of Secretary

¹ See as to the history of this Board, Clode, *Military Forces of the Crown*, chaps. i, xx.

at War, and separately responsible to Parliament for the money voted to its use. At the head of the Board was the Master-General of the Ordnance, an important member of the Government throughout the eighteenth century, and its chief adviser in military matters. He was Commander-in-Chief of the artillery and engineers, and presided at the Board of Ordnance, the duties of which had widely expanded since they were reorganized and defined in the reign of Charles II.

The
Master-
General.

At first it had charge of the King's forts for national defence, of the guns and stores for their use, and for the navy. As the army became a permanent and an increasing factor in the national expenditure, the business of keeping the necessary stores and entering into contracts for their supply grew in importance. The Board started in business on its own account, and established factories for the foundry of guns, the making of carriages, the supply of powder and of small arms. Then, too, it held on behalf of the Crown the sites of the royal forts, and during and after the reign of Anne received from time to time Statutory powers for the acquisition of land for purposes of national defence. To the Ordnance Department also fell the duty of making an authoritative survey of the United Kingdom. The civilian who avails himself of this work for business or pleasure is apt to forget that he owes its existence to the needs of military topography.

Increase
of duties.

Factories.

Survey.

The duties of the Board, therefore, comprised the making and maintenance of forts, the acquisition and holding of land for that purpose, the purchasing, warehousing, and forwarding of stores, the manufacture of various articles for the use of the army and the survey of the United Kingdom.

These duties were transferred early in 1855 to the Secretary of State for War, the Board, as a separate department, ceased to exist, and its Parliamentary powers were vested by Statute 'in the Principal Secretary of State, to whom the Queen has entrusted the Seals of the War Department¹.'

Abolition
of the
Board.

¹ 18 & 19 Vict. c. 117.

(b) *The Secretary at War.*

The office of Secretary at War dates from the reign of Charles II. Until the commencement of the present century its duties were ill defined, and their ambiguity is doubtless owing to the different points of view from which the army was regarded by the Crown and by Parliament.

Position of
Secretary
at War.

In the reigns of Charles II, James II, and William III, the Secretary at War, though appointed by commission and not by delivery of seals, acted in some respects as a Secretary of State. His counter-signature authenticated the sign-manual, and this on state papers which had not to do with the army¹.

But the Secretaries of State increased in power as Cabinet Government developed: not so the Secretary at War. And the difference is instructive. The united action of political leaders in Cabinet Government, and the tenure of office subject to the support of a Parliamentary majority, changed the Secretary of State from a mere mouthpiece of the Crown or the Privy Council into the independent head of a department responsible to Parliament as well as to the King for the discharge of the duties of his post.

A servant
of the
Crown.

But the Secretary at War did not enjoy the complete responsibility to Parliament which enhanced the position of the Secretary of State. The terms of his commission enabled him to contend that he was the servant of the King, or of the General of the Forces for the time being; that he was bound to carry out the orders given to him by his master, and was not bound to account to Parliament for what was done². It did not suit either the King or those who professed most anxiety for the liberties of the people to enforce the Parliamentary responsibility of the Secretary at War. The one

¹ Clode, *Military Forces of the Crown*, ii. 255.

² Pulteney when Secretary at War in 1717 held that he was 'a ministerial not a constitutional officer, bound to issue orders according to the King's direction,' and so justified an execution of officers after the rebellion of 1715 which he knew at the time to be of doubtful legality, and which was in fact illegal.

did not desire to see the exercise of his military prerogatives brought under the supervision of Parliament, the other would gladly be rid of the office and the army as well. The popular statesmen of the first half of the eighteenth century would have considered that in making the Secretary at War accountable to Parliament they were recognizing a standing army as a permanent part of the constitution. Not responsible to Parliament.

During the greater part of the last century the business of the Secretary at War was to communicate the King's pleasure in matters of military administration, to prepare for the King's signature, and to countersign warrants on the authority of which the Treasury paid over to the Paymaster of the Forces the money voted by Parliament for the maintenance of the army. But in 1783 a definite Parliamentary responsibility was for the first time imposed upon the office¹. Mr. Burke's Act. His duties.

Act required the Secretary at War to prepare estimates for Parliament in each year, to transmit the money when voted to the Paymaster of the Forces, and to receive and settle annually the accounts of expenditure.

In 1793 and 1794 two further changes in military administration took place, which had important effects on the office of Secretary at War.

(c) *The Commander-in-Chief and the Secretary at War.*

In 1793 the office of General Commanding-in-Chief was established, and in 1794 a third Secretary of State was appointed for War.

The establishment of a permanent Commander-in-Chief meant that the King gave up the personal command of the army: it meant also that in all matters relating to the internal discipline and regulation of the army the royal pleasure would henceforth be communicated, not by the Secretary at War, but by the Commander-in-Chief. From this time arose the dual control of the army: the Horse Guards, side by side with the War Office. The dual control.

¹ 22 Geo. III, c. 8; 23 Geo. III, c. 50.

Am-
biguous
position of
Secretary
at War.

As to
Secretary
of State.

What the Secretary of State for War took from the hands of the Secretary at War is not easy to define. It is generally described by Lord Palmerston as 'business of a political nature formerly transacted at the War Office.' Probably the Secretary at War had been used to submit to the Cabinet the proposed number and employment of the forces: these matters were henceforth settled by the Secretary of State, who left to the Secretary at War merely the preparation of estimates upon instructions received from the Cabinet. No doubt also in the absence of any official of Cabinet rank responsible for the conduct of the War Office, the Secretary at War transacted business which would more properly have been dealt with by a Secretary of State. Thus in 1759 the Secretary at War conducted negotiations with the Court of France for an exchange of prisoners: in 1782 he refused the aid of the military to the civil power at an execution where disturbance was apprehended¹. He might in fact enlarge his functions as in the case just cited, or he might, and sometimes did, minimize his responsibilities and deny all knowledge of anything connected with the army beyond the requirements of Burke's Act².

As to Com-
mander-
in-Chief.

In 1810 came a collision which, it was plain, must some time occur between the Horse Guards and the War Office, the Commander-in-Chief and the Secretary at War. It is only interesting now as showing the slow degrees by which the exercise of the royal prerogative in respect of the army was accommodated to the theory of ministerial responsibility. Until 1793 the King in person controlled the affairs of the army, and communicated his wishes for most purposes through the Secretary at War. The Commander-in-Chief thought that the Secretary at War stood in the same relation to him

¹ See Lord Palmerston's Memorandum on the Office of Secretary at War; Clode, ii. 698, 701-2.

² Parl. Hist., vol. xx. p. 1253. 'The Secretary at War (Jenkinson) declared he was no minister, and could not be supposed to have a competent knowledge of the destination of the army, and how the war was to be carried on.' December 9, 1779.

as formerly to the King, that he was a subordinate, entrusted with the duty of seeing that the law was observed as between soldier and citizen, and accounts balanced as between Parliament and the army. Lord Palmerston, who was Secretary at War in 1810, considered that his control of military finance and accounts entitled him to issue orders and regulations which the Commander-in-Chief, Sir David Dundas, regarded as acts of interference. The one asserted, the other denied, that the War Office was independent of the Horse Guards. Lord Palmerston supported his case in an exhaustive historical memorandum, and the matter was referred to the Cabinet. The financial control of the War Office was upheld, but the Secretary at War was desired by the Prince Regent not to issue any new order or regulation until it had been communicated to the Commander-in-Chief. If he objected the dispute was to be settled by an appeal to the First Lord of the Treasury, the Chancellor of the Exchequer, or the Secretary of State for War and the Colonies.

Collision
in 1810.

From this time onward the two departments worked side by side without further collision. Until the Crimean war the Secretary at War continued to prepare and submit estimates to Parliament, checked the details of military expenditure, was responsible for the provisions of the Mutiny Bill, for the due execution of military law, and for the security of civil rights, that is to say, it was his duty to see that the conditions under which the soldier entered the army were not unduly severe and that the soldier did not injure the citizen in person or property.

In February, 1855, the Secretary of State for War was commissioned to act also as Secretary at War, and in 1863 the office was abolished and its duties transferred to the Secretary of State¹.

Abolition
of the
Secretary
at War.

(d) *The Commissariat.*

Of this department little need be said. Until the Crimean war the Treasury retained in its own hands the business of

The Treas-
ury and
the Com-
missariat.

¹ 26 & 27 Vict. c. 12.

finding the army in food and forage, fuel and light. At home and abroad the officers of the Commissariat acting under the Commissioners of the Treasury made the contracts for these articles, supplied them to the troops, paid for them out of the sums voted by Parliament, and rendered accounts of the money received and paid. The system seems to have worked better than might have been expected, but at the general centralizing of military departments which took place during the Crimean war the Commissariat was handed over to the War Office.

(e) *The Secretary of State.*

The Secretary of State for War is the great officer of state who has absorbed the duties of so many departments. The office came into existence in 1794; in 1801 the business of the Colonies was added to it, and until June, 1854, its holder was responsible for this business as well as for the number of the troops, their distribution, and matters of general policy respecting the army.

War
and the
Colonies.

The constitution of this office must at all times have been anomalous. Its holder had to deal with two great matters of State, our Colonial and military business, incongruous in themselves, and rendered harder to deal with by the extreme complexity of our military organization. For the Home Secretary had also a voice in the affairs of the army. He dealt with all matters of internal defence: commissions for all but Indian or Colonial corps were prepared at the Home Office and countersigned by the Home Secretary¹. When arms were wanted for the soldiers the Commander-in-Chief stated his requirements to the Secretary at War, the Secretary at War requested the Secretary of State for the Home Department to communicate the needs of the Commander-in-Chief to the Ordnance Board, and so in due time the army got what it wanted.

Duties as
to war.

In time of peace the Secretary of State for War and the

¹ Clode, ii. 70.

Colonies had little more to do with the army than to submit to the King the advice of his ministers as to the number of the forces, to communicate the result to the Commander-in-Chief, to attend to the protection of our colonial possessions and to correspond with officers on colonial service. In time of war he was responsible for the measures adopted, other than those of internal defence, and was in communication with the officers in command on foreign service.

But the Secretary at War, who should naturally have been his subordinate, was wholly independent of the Secretary of State. The appointment of a Secretary of State for War was important as regards the constitution, because now for the first time the general policy of government as to the army was placed in the hands of a definite person holding office of the highest rank and responsible to Parliament. The Secretary at War, as we have seen, did not think himself responsible for anything more than the payment and discipline of the soldiers, and their observance of the law of the land.

But the vague and partial character of the control which the Secretary of State for War and the Colonies exercised over military matters, extended to his Parliamentary responsibility. The dispersion of duties over so many departments led to mismanagement in time of war, and it was hard to say which, if any, of the departments was to blame for faults which sprang not so much from their conduct as their constitution.

In 1854 a fourth Secretary of State was appointed for War, and to him were shortly assigned the duties of all the departments with which I have just dealt. In 1855 he was made Secretary at War as well as Secretary of State, then the Commissariat was transferred to the War Office, then the Board of Ordnance disappeared, and its duties were handed to the same department. In the same year the Board of General Officers, which had been responsible for the inspection of clothing, and the Army Medical department were absorbed in

Unconnected
with
Secretary
at War.

Reforms of
1854 and
1855.

the War Office, and in the following year arrangements were made that the military accounts should be audited in this same office by auditors responsible to the Commissioners of Audit.

Thus the Secretary of State for War, assisted by a Parliamentary Under Secretary of State and a permanent staff, became directly responsible for the entire civil administration of the army. The Commander-in-Chief still exercised an independent military control, but the Secretary of State was responsible to Parliament for the exercise of this control.

§ 2. *The government of the army from 1855 to 1870.*

Over-
whelming
duties of
Secretary
of State.

But the premature centralization of 1855 was not the end of changes in the administration of military affairs. It threw upon one man the duties of three departments, while it left his relations to the Commander-in-Chief as indefinite as they had been in the days of the Secretary at War. Soon it became clear that the Secretary of State could not combine the detailed duties of the legal and financial departments, of the manufacture or purchase and supply of the necessaries for the Ordnance and the Commissariat Departments, and the general responsibility for the policy of army administration.

Attempts
at division
of labour.

Then the work of decentralization began, not in the sense of restoring the independent departments, whose separate action and responsibility had paralyzed military operations in the Crimean war, but rather with a view to the logical and scientific apportionment of duties to those most competent to discharge them, in such a way that while the Secretary of State remains responsible for all and everything that is done by or in respect of the land forces of the empire, he is as little as possible encumbered with the detail of the various departments of the great military machine. First in 1868 a Controller-in-Chief was appointed, who should be a permanent officer, responsible to the Secretary of State for the supply and transport of the army. Then in 1869 Mr. Secretary Cardwell found that there was further need of

The Con-
troller-in-
Chief.

Parliamentary assistance, for the Under Secretary of State represented the War Office in the other House. In that year he tried to meet the difficulty by obtaining the assistance of one of the Lords of the Treasury, called for the time the 'War Lord.' But in 1870 it became necessary, by Statute and Order in Council, to group the business of the office in three departments.

These departments were, (1) *Military*, under the Commander-in-Chief, who would hold his office irrespective of party changes, (2) *Ordnance*, and (3) *Finance*, the two latter being represented respectively by a Surveyor-General of Ordnance and a Financial Secretary, the one responsible for commissariat, munitions of war, barracks and transport, the other responsible for the preparation of the estimates, the amount of money expended, and for proposals for any redistribution of money allotted to different votes for services. Both these officers were chosen by the Secretary of State for War, and held office at his pleasure. All three departments were under the ultimate control of the Secretary of State, who was generally responsible for military affairs; their duties were prescribed by an Order in Council, and the relation of the Commander-in-Chief to the Secretary of State was by the same order defined as one of complete subordination¹.

The
threefold
division.

§ 3. *The War Office since 1870.*

(a) *The duties of the Secretary of State.*

The Secretary of State for War is thus responsible for things different in character, and sometimes even conflicting.

Duties of
Secretary
of State,
as to con-
dition and
discipline
of army,

He must decide what may be called political questions concerning the army, the conduct of a war, the despatch of troops at any moment to any part of the Queen's dominions, the relations of soldier and citizen, the maintenance of discipline,

¹ 33 & 34 Vict. c. 17; and see Order in Council, June 4, 1870; Parliamentary Papers [c. 164] for 1870.

and the securities for efficiency by systems of promotion and compulsory retirement.

forts and
commissariat,

He is responsible for the fortifications and commissariat being in such a state of preparation that we may be ready for defence or attack at any time.

materials
of war,

He must follow the march of science in the invention of instruments of destruction, must ensure that our cannon, small arms, and ammunition are of the newest and best, and that we have enough. He must be able to decide business questions arising in connection with the great factories in which the State manufactures cannon, powder, small arms, and carriages. He is responsible for the finance of the army, that is for the annual demand and outlay of some eighteen or twenty millions.

finance.

His pre-
paration
for them.

His duties would be most exacting even if he came to them in possession of special knowledge and familiarity with every department of military affairs, or were able to give his exclusive attention to these duties. Neither of these conditions is fulfilled. We require our statesmen to be as versatile as our troops: the latter are expected to serve in all climates and under all conditions, the former to undertake the administration of any department of government, and both are expected to be ready at the shortest possible notice.

The Secretary of State for War is certainly not selected for that office by the Prime Minister because of his military experience or scientific attainment. Aptitude for debate and a reputation for business capacity are the essentials: anything more than this must be a matter of chance.

His duties
in Parlia-
ment;

Nor has the minister thus burdened with novel duties the power of giving his exclusive attention to them. He is a member of Parliament, generally of the House of Commons, and then he has a constituency to please. As a member of the Cabinet he must attend to the political questions of the day, and may be called upon to support his colleagues in debate.

in the
Cabinet.

(b) *The division of labour.*

We must inquire what assistance the Secretary of State for War receives in the discharge of his various duties. The assistance must necessarily be of two kinds, Parliamentary and professional. In Parliament he needs help, not merely for the representation of his department in that House of which he is not a member, but for the transaction of the financial business of the War Office and its explanation in the House of Commons. He is, therefore, assisted not only by a Parliamentary Under Secretary but by a Financial Secretary. Assistance in Parliament.
The Financial Secretary.

In addition to these, Mr. Cardwell in 1870 obtained the sanction of Parliament to the creation of a new Parliamentary representative of the War Office, the Surveyor-General of the Ordnance. It was expected that this office would be held by a soldier of rank and experience, who should assist the Secretary of State and the House of Commons as an exponent of the best professional opinion on military matters. The Surveyor-General;

But the office did not fulfil these expectations. During the eighteen years of its existence it was only twice filled by a soldier of the qualifications contemplated, and on one of these occasions the holder was not in Parliament. In 1887 it was found that the Surveyor-General was rarely able to form a skilled opinion of his own on the business of his department, and that he was merely the Parliamentary mouthpiece of the military men who were responsible for its various branches. his office a failure.

The office was therefore abolished, and an Order in Council of February 21, 1888, redistributed the business of the War Office, dividing it into a *Military* side and a *Civil* side, both subject to the administrative control of the Secretary of State as responsible for the exercise of the royal prerogative in respect of the army. Order of 1888.
The Military side.

By this Order the Commander-in-Chief was made solely responsible for advising the Secretary of State on all military

matters, while on the Civil side the Financial Secretary was charged with—

The Civil
side.

Review of expenditure proposed in annual estimates and the compilation of estimates.

Financial review of proposals for new expenditure.

Audit of accounts and issue of warrants for payment of money.

Control of manufacturing departments and contracts.

Advising the Secretary of State on questions of expenditure.

Order of
1895.

In 1895 a change was made. The duty of advising the Secretary of State on military matters of every description was thought to be too heavy to throw upon any one man, and the burden of the Commander-in-Chief was lightened, and his responsibilities, to a certain extent, dispersed by an Order in

The Com-
mander-
in-Chief.

Council of November 21, 1895. The Commander-in-Chief is henceforth to exercise a general control over the military forces of the Queen at home and abroad, and a general supervision of the military departments of the War Office. He is charged with the general distribution of the army, with the preparation of plans for its mobilization, and for offensive and defensive operations, with the collection of military information, with appointments, promotions, honours and rewards. He is the *principal adviser* of the Secretary of State on all military questions.

The
Adjutant-
General.

The Adjutant-General is charged with discipline, military education and training, with enlistment and discharge.

The
Quarter-
master-
General.

The Quartermaster-General is charged with the supply of food, forage, fuel and light, with transport by land and water, and with administering the non-combative services of the army.

Inspector-
General of
Ordnance;

The Inspector-General of Ordnance provides warlike stores and equipment; he inspects these stores, considers questions of new arms and their patterns and designs, and administers the services connected with the Ordnance.

of Fortifi-
cations.

The Inspector-General of Fortifications is concerned with fortifications, barracks, and buildings for stores, with military

railways and telegraphs, and the custody of land belonging to the War Office.

Shortly, one may say that the Adjutant-General provides the soldier, that the Quartermaster-General feeds him and moves him about, that the Inspector-General of Ordnance arms him, and that the Inspector-General of Fortifications finds him shelter in war and peace. Summary of duties.

But two duties are common to these four officers. Each must submit proposals for annual estimates for the services under his charge, and each *must advise the Secretary of State on all questions connected with the duties of his department.* Duty to advise the Secretary of State.

Thus the Commander-in-Chief is no longer the sole, though he is the principal, military adviser. The four chiefs of the special departments are bound to advise the political chief. In the absence of the Commander-in-Chief the Adjutant-General is to act for him in this as in other matters.

(c) *The Commander-in-Chief.*

Before passing to the mode in which the system works it may be well to note the relations of the Secretary of State for War and the Commander-in-Chief.

When this office was created in 1793 it was hoped that by vesting in the Commander-in-Chief the exercise of the prerogative as to promotions and appointments in the army such matters would be dealt with by an officer, free from the prepossessions of party and politics, who would regard no other interest save that of the army. The object of the office.

The wide dispersion of duties in respect of the army which prevailed before 1855 may account for the absence of any collision between the Commander-in-Chief and the political heads of departments, except on the occasion mentioned above in 1810. But when the various departments were consolidated and entrusted to a Secretary of State it became necessary to define his relations to the Commander-in-Chief. At first the Secretary of State received, besides the seals and letters patent The separation of powers.

conferring his office upon him, a supplementary patent restraining him from interfering with 'the military command and discipline of the army, and appointments and promotions therein.' This was explained in 1860 to mean only that the Commander-in-Chief exercised his power as heretofore, but subject to the responsibility of the Secretary of State. The supplementary patent was abandoned and a memorandum drawn up in which the Queen expressed her pleasure as to the distribution of duties between the two officers and the responsibility of the one for the action of the other¹.

Subordin-
ation of
Comman-
der-in-
Chief.

In 1870 the Order in Council was made to which I have already referred. The duties of the Commander-in-Chief were defined, and were to be exercised subject to the approval of the Secretary of State for War, and to his responsibility for the administration of the royal authority and prerogative in respect of the army. These duties were modified in 1888 and again in 1895, but the subordination of the military side to the political chief has never been questioned since 1870.

(d) *The Secretary of State and Parliament.*

The mode in which the system works may now be considered, and the relations of the Secretary of State to Parliament and to the army.

Responsi-
bility to
Parlia-
ment,

His relations to Parliament are these. First he must every year ask Parliament to legalize the standing army and the rules necessary for its discipline, and to vote the money required for its efficiency in all branches of the service. And next he must answer to Parliament when called upon to do so for the exercise by the Crown of its prerogative in respect of the army.

as to
finance;

Aided by the Financial Secretary he receives the demands of the military heads of the departments, and must endeavour to reconcile the requirements of the army for money with the

¹ Clode, ii. 351, 738.

requirements of the Treasury for economy. Ultimately the amount of the estimates for the various branches of the service must depend upon the decision of the Cabinet, which, in forming its decision, is sure to keep in view the probable wishes of its majority in the House of Commons and in the country. The Treasury loves economy for its own sake; the Cabinet likes economy because economy is popular, but it is collectively responsible, with the Secretary of State, for the condition of the army. In the end perhaps the House thinks that the estimates are extravagant, while the army thinks they are insufficient. But there can be no doubt that the House is more ready to grant the sums demanded when the demand is made by a civilian, after passing the criticism of the Treasury and the Cabinet, than it would be if the demand were made by a military expert, who might be supposed to think no money ill spent which was spent on his department.

It is a weak point in the system that Parliament knows nothing of the original demands made by the military heads of departments, nor of the ground of their reduction in the War Office, Treasury, or Cabinet. The estimates represent a compromise: not what the military authorities think it right to spend, but only how they propose to spend the sum which the Cabinet propose to demand. Perhaps if the original demand and the ground of reduction were made known both demand and reduction would be made under a greater sense of responsibility¹.

The Secretary of State is responsible for the exercise of the royal prerogative, and everything that is done in the army is done subject to his approval. For the use of these powers he is responsible to Parliament. He must answer to Parliament for the discipline of the troops and for their relations with the citizen as well as for their distribution, efficiency, and cost. The House of Commons may express its disapproval of a Minister directly by censure, or indirectly by refusing him

¹ See, on these points, Ordnance Inquiry Commission, p. xiv.

a vote on a question which he thinks important in the business of his office: but while he holds office he is responsible for the exercise of the Queen's prerogative in respect of the army, and is bound to take care that the prerogative is exercised by the Crown and not by Parliament. No one would desire to see the army the servant of a majority of the House of Commons, nor is it possible to conceive that the management of any minister however incapable would be so bad as the management of an indeterminate number of irresponsible politicians.

as to
appoint-
ments
and dis-
missals.

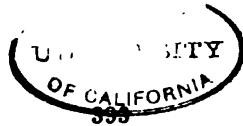
Especially is the Secretary of State bound to maintain the discretionary prerogative of the Crown in the appointment and dismissal of officers, their promotion or reward, or the acceptance of their resignation. This prerogative is exercised through the Commander-in-Chief, on the responsibility of the Secretary of State: and it is the more important that power of this sort should be in the hands of a non-political officer such as the Commander-in-Chief, because our army, unlike the armies of other European countries, is not divorced from the political rights of citizenship. The soldier, if duly qualified, may exercise the franchise: the officer may sit in the House of Commons. Plainly then, the King or a Minister of the Crown might use, or be pressed to use, the powers of appointment, promotion, or dismissal for political and party ends. The history of the last century attests the reality of this danger. The office of Commander-in-Chief, as constituted in 1793, was intended to meet it¹.

(e) *The Secretary of State and the army.*

In his relation to the army we must note a difference in the position of the Secretary of State for War and that of the First Lord of the Admiralty. The latter is the first and chief of a Board, which collectively represents the Lord High Admiral and is at the head of the naval profession: the Secretary for War has no such position in respect of the army. The Commander-in-Chief is at the head of the military profession. He

His rela-
tion to the
profession.

¹ See debates in 27 Parl. Hist. 1310-1318; 30 Parl. Hist. 170-174.



has access to the Crown: he was for a long time independent of the civil departments, although he now is held to act in subordination to the political ruler of the army. The Admiralty Board is thus more closely connected with the service which it controls than is the War Office.

A more important matter is the security which exists that the Secretary of State for War should be furnished with the best professional opinion on military matters. Until the Order in Council of 1895 there was no one responsible for advising the civilian Minister except the Commander-in-Chief. We now see that the heads of the chief departments on the military side of the War Office are bound to advise him on the matters with which they have to do.

His opportunities
for in-
formation.

§ 4. *The Admiralty.*

I was able to deal more fully with the Admiralty than with the War Office in speaking of the departments of government, because the Admiralty stands by itself, whereas the Secretary of State for War is only one of the group of Her Majesty's Principal Secretaries of State. And besides this, the War Office of to-day represents several distinct departments, and its history has been complicated by constitutional questions from which the history of the Admiralty is free. So I need only touch here upon the practical working of the department as contrasted with that of the War Office.

The War Office represents the concentration of responsibility for the exercise of the royal prerogative in respect of the army in the hands of a single Minister. The Admiralty is constituted by letters patent as a Board consisting of five Commissioners, of whom all or any two are equally capable of discharging the functions of the High Admiral of the United Kingdom and the territories thereto belonging, and of the Colonies and other dominions of the Crown. On these Commissioners is cast the duty of building, arming, and victualling the fleet, of giving all orders, conferring all offices

Duties of
Board.

and appointments, of superintending arsenals, dockyards, and naval hospitals, and making all necessary contracts in respect of the navy. But the constitution of the Board by its Patent does not correspond with its actual working. Orders in Council have added to the Board two Secretaries, one Parliamentary and one Permanent, who are not in the Patent. And the practice of the Board as regards the relative position of its members was confirmed by Order in Council of 1872, which made the First Lord responsible to the Queen and to Parliament for all business of the Admiralty.

Its composition.

The Board consists of the following persons:—

The First Lord: four Naval Lords, the third of whom is also ‘Controller of the Navy,’ and ‘responsible to the First Lord for so much as relates to the *material* of the navy’: a Parliamentary Secretary, responsible to the First Lord for the Finance of the navy; a Civil Lord; a Permanent Secretary¹.

‘The Department possesses more the character of a Council with a supreme and responsible head than that of an administrative Board.’ The responsibility of members of this Council other than the First Lord seems to be somewhat uncertain.

Responsibility of members:

Some of the Naval Lords appear to consider the entire Board to be jointly responsible, and each member bound to offer his best advice on the requirements of the navy.

Others consider that responsibility for the efficiency of the navy rests with the Parliamentary chief, and ultimately with Parliament; that the First Lord should ask the Naval Lords for advice, and must not expect to receive it unasked, and that each Lord is responsible only for the business of his department².

¹ The senior Naval Lords are responsible for so much of the business relating to the *personnel* of the navy as the First Lord may assign to them. The Civil Lord and Permanent Secretary have their duties assigned to them by the First Lord. The duties described in the text are fixed, and those in this note are indicated by Orders in Council of March 19, 1882.

² Report on civil and professional administration of Naval and Military Departments, 1890, p. ix, and App. i. pp. 8, 9 [c. 5979].

But perhaps the working of the department may fairly be described as follows :—

and of
First
Lord.

The First Lord is solely responsible to the Crown and to Parliament for all the business of the Admiralty; to this extent the Patent is modified by the Order in Council.

The First Lord distributes the business of the Admiralty among the members of the Board, and for the transaction of the business so assigned to him each member is responsible.

Most of this business is transacted outside the Board by the heads of the sub-departments, either on their own responsibility or after an informal consultation between all or some of the members of the Board. Papers are sent for the approval of the Lord in whose department the business lies. Sometimes his approval alone is sufficient. Sometimes other members of the Board must express an opinion. As a general rule such papers are sent the round of the whole Board, not necessarily for approval but for information¹.

Mode of
trans-
acting
business :

The business of the Admiralty falls into four groups :—

distribu-
tion of
business.

- (1) The *personnel* of the navy: the movement, condition, and organization of the fleet (including coaling), and maritime defence.
- (2) Naval construction, dockyards, ordnance, and stores.
- (3) Works, and the *personnel* of the Civil Departments.
- (4) Finance.

The first group is distributed in detail among the first three Naval Lords.

The second is assigned to the Lord who is also Controller of the Navy, the third to the Civil Lord, and the fourth to the Financial Secretary.

The Board meets once a week, or oftener if need be, for two purposes: to give formal assent to matters which should come before the whole Board; and to consult upon and determine questions of general policy, such as the ship-building programme of the year.

¹ Report on civil and professional administration of Naval and Military Departments, 1890, App. i. p. 4.

Comparison of Admiralty and War Office.

Herein lies the difference between the First Lord of the Admiralty and the Secretary of State for War. No individual responsibility is laid upon any one to advise the First Lord, such as the Order in Council of 1895 creates in favour of the Secretary of State: on the other hand, the First Lord has a Board of competent advisers meeting weekly, or as often as he may choose to summon them.

In other respects the position of the two Ministers is much the same; each is generally a civilian, each is a Cabinet Minister and Member of Parliament, each has to deal at the same time with the general affairs of State and with the special business of a vast and complex department. The duties of the First Lord are if anything the more onerous of the two, for the changes in scientific opinion, as regards the building, arming, and capacity of ships, and the construction of submarine engines of destruction, involve questions of policy and of expenditure from which the War Office is relieved.

The connection of the departments.

Although the War Office and Admiralty are distinct departments, they have some points of necessary connection.

While the Ordnance Board existed it supplied both departments alike with war material. When it ceased to exist as a separate department, the War Office, in which it was merged, continued to design and make guns for the navy, and the stores of the two departments were kept together. The joint custody of stores was abandoned in 1891, but care is taken that the ordnance of Army and Navy should be interchangeable.

Committee of Cabinet.

A more important point of contact is the Committee of the Cabinet constituted in accordance with the recommendations of the Commission which reported in 1890¹. This Committee, consisting of the Prime Minister, the Parliamentary heads of the two services, the First Lord of the Treasury, and the Colonial Secretary, if need be, deals with questions unsettled between the two departments, matters in which

¹ Report, 1890 [c. 5979], p. viii.

a joint naval and military policy should be formed, and proposals for expenditure as to which the two services may profitably compare notes and determine the relative importance of their respective demands. Such a Committee of the Cabinet might, of course, have been formed at any time, but this Committee so far differs and departs from the ordinary procedure of the Cabinet and its Committees that minutes are kept of its proceedings, and are formally recorded by the two departments concerned.

CHAPTER IX.

THE CROWN AND THE CHURCHES.

SECTION I.

INTRODUCTORY.

§ 1. *The State and Religious Societies.*

THE relations of the Established Church to the Crown in Council and to the Crown in Parliament are very apt to be misunderstood, and it may be well to consider the relations which must subsist between any and every religious society and the Crown.

A religious
society.

A religious society exists, one must suppose, for the purpose of maintaining and enforcing definite articles of faith and of doctrine, rules of conduct corresponding to its belief, and forms of worship designed to influence faith and conduct.

Its subor-
dination
to Parlia-
ment,

But such a society is in necessary subordination to Parliament, because Parliament may make the profession of its opinions unlawful, may subject the performance of its acts of worship to a penalty, may impose tests which disqualify its members for office or franchise. Parliament in its omnipotence may do what it will with any religious society; it may pass righteous laws forbidding the public expression of opinions which are shocking or painful to the majority of citizens, or the public use of forms or rituals which disturb or demoralize them; or it may pass unrighteous laws interfering with freedom of religious opinion, or of worship, or with the free action of voluntary societies.

And again, every religious society, large or small, which enters into relations of property or contract, must necessarily be liable to have its doctrines discussed in a court of law. If two persons engage a third to preach a certain doctrine to them for a sum named, and refuse to pay him on the ground that his teaching has not conformed to the opinions which they engaged him to enforce, a court of law can duly settle the matter between the disputants by comparing the doctrine which the preacher undertook to teach with the doctrines which he taught.

§ 2. *Establishment.*

But the Established Church has a closer connection with the State than this necessary subordination to Parliament and liability to have its *formulae* discussed and interpreted in courts of law. The Queen is Head of the Church, not for the purpose of discharging any spiritual function, but because the Church is the National Church, and as such is built into the fabric of the State. The Crown itself is held on condition that the holder should be in communion with the Church of England as by law established. The Convocation of the Church is summoned, prorogued, and dissolved by the Crown, it cannot enter on ecclesiastical legislation without royal permission, nor make Canons without the royal license and assent.

The Crown appoints the great officers of the Church, and of these the Bishops are not only administrators and judges of ecclesiastical law, but constitute the Lords Spiritual in the House of Lords.

The courts of the Church are not private tribunals for determining the internal differences of a voluntary society: the law of the Church is a part of the law of the land, and the Queen is over all persons in all causes, as well ecclesiastical as temporal, within her dominions supreme.

For not only is the Church unable to make new canons without the royal assent, but its liturgy and articles of religion have a Parliamentary sanction: though not made by Parliament,

they have been accepted by Parliament, and therefore they need the combined action of Church and State to alter them.

A brief historical note is necessary in order to understand how these relations have come about.

§ 3. *The National Church before the Constitutional Reformation.*

The
Conver-
sion.

The conversion of England was effected piecemeal, partly from Ireland, partly from Rome during the seventh century. The Roman influence prevailed, and the English Church became a national church in communion with the Church of Rome, recognizing under a gradual process of encroachment a metropolitan jurisdiction in the Pope of Rome, until it threw off his jurisdiction in the reign of Henry VIII, and ceased to be in communion with the Roman Church.

The character of its relations with Rome was substantially fixed by William the Conqueror, and the rules which he laid down were broken, revised, re-enacted, and broken again till they were firmly embodied in the legislation of Henry VIII.

The Saxon
Church.

In Saxon times the Church was the nation in its religious aspect; for the Church had been an institution common to the whole country before the unstable unity achieved by the Kings of Wessex. Kings and ealdormen attended the ecclesiastical councils of the heptarchic kingdoms; the Bishops were members of the witan: ecclesiastical legislation was frequently confirmed in the witan or gemot. In the tenth and eleventh centuries these ecclesiastical councils became unfrequent¹, and ecclesiastical regulations were largely made in the lay assemblies. As the distinction between the ecclesiastical and civil is obscure in the region of legislation, so it is in that of jurisdiction. The Bishop sat with the sheriff and ealdorman in the shiremoot to declare the law spiritual. How far the Bishops had domestic tribunals to deal with purely spiritual offences among the clergy, seems uncertain².

The Conqueror forbade Bishops and Archdeacons to hold

¹ Stubbs, Const. Hist. i. 230 242.

² Ibid. 233.

spiritual pleas in the court of the hundred, and required them to have courts of their own, to decide cases not by customary but by canon law, and to allow no laymen to adjudicate on spiritual questions. The King and sheriff would carry out the sentence¹. This great change made the Church a distinct body within the State. The law for the clergy was not the law for the laity, nor was it administered in the same courts. Canon law was growing, here and elsewhere, into a mass of arranged and digested rules. It included not merely regulations for the clerical life and order, and a system of penitential discipline applicable to the laity, but the law applicable to matrimonial and testamentary causes. A rivalry at once grew up between secular and spiritual courts, the latter endeavouring to oust the jurisdiction of the former in respect of persons and encroach on their business in respect of causes.

The
Norman
changes.

The
Church
judiciary,

More important still was the question of the independent legislative power of ecclesiastical assemblies to make canons enforceable in the ecclesiastical courts, and the question of the right of a suitor, if dissatisfied with the decision of these courts, to carry an appeal to Rome. William met dangers which these last questions suggested by making and enforcing certain rules.

and legis-
lative.

(a) No one in his dominions might receive the pontiff of Rome as apostolic pope except at his command, or receive papal letters unless first shown to himself.

The rules
of the Con-
queror.

(b) Nothing was to be enacted or forbidden by the Archbishop in an assembly of Bishops except what was agreeable to him and had first been enjoined by him².

The first of these rules strikes at the unauthorized recognition of the Pope as a final court of appeal, the second at the independent legislative action of the Church. A third usage, claimed as a settled rule by Henry I, made it unlawful for legatine power to be exercised or for a legate to land in England without a royal license³.

¹ Stubbs, Charters, p. 85.

² Stubbs, Const. Hist. i. 285.

³ Stubbs, Const. Hist. i. 286.

The claims of the clergy: These early constitutional relations of Church and State help to elucidate the controversies of later times.

immunity from secular courts; The clergy claimed immunity from secular jurisdiction; it was one object of the Constitutions of Clarendon, an object not wholly attained, to make them equal with laymen before the law.

enforcement of spiritual penalties; The Church courts enforced spiritual penalties with the aid of the secular power, and the abuses of this jurisdiction, under which penance was commutable for a money payment, were matter of grave complaint in the later days of the unreformed Church.

appeals to Rome; Appeals were carried to Rome despite the rules of William I and the Constitutions of Clarendon, but the corruption of the Roman Court seems to have enabled the appellate jurisdiction of the Archbishop to compete successfully with that of Rome.

legislative independence of Convocation. Thus much for jurisdiction. The ecclesiastical assemblies had undergone a change, due to the practice which began to prevail from the end of the twelfth century of taxing separately the estate of the clergy. To settle the sums which should be granted, representative assemblies of the clergy of each province were summoned, but by no mandate from the Crown¹. Representation for taxing purposes led to representation for purposes of general discussion: the refusal of the clergy to attend Parliament when summoned, and their insistence on their right to determine their contributions in their own assembly, brought about two results. The lower clergy acquired a permanent place in their convocations: and the King found it to be for his interest that the provincial assemblies should meet with frequency.

Thus the estate of the clergy kept apart: divided in the convocation of each province into two houses, an upper and a lower; meeting without the royal summons; enacting canons without the royal assent; claiming to be exempt in some respects from the secular tribunals; looking to Rome for an ultimate court of appeal.

¹ Stubbs, Const. Hist. ii. 175.

SECTION II.

THE REFORMATION SETTLEMENT.

§ 1. *The aspects of the Reformation.*

The Reformation is a general term for three distinct forms ^{The changes,} of change which affected the Church of England in the sixteenth century—doctrinal, social, constitutional.

With the doctrinal change we are but indirectly concerned. ^{doctrinal,} The Church of England ceased to be in communion with the Church of Rome, recast its Liturgy, and determined various points of controversy in the Articles of Religion. With the substance of the change we have nothing to do; with the effect given to the change by enactments in Parliament we must presently deal.

The social change brought about by the dissolution of the ^{social,} monasteries and the permission accorded to the clergy to marry¹ may be passed over.

The constitutional change is of importance here.

Henry VIII was declared to be the 'only Supreme Head ^{constitu-} on earth of the Church of England².' The Act which con- ^{tional.} ferred this title was repealed by Mary, and was not revived ^{The royal} by Elizabeth. But her Act of Supremacy³ asserted, and re- ^{suprem-} quired all holders of office, lay and clerical, to acknowledge by ^{acy.} oath that the Queen was sovereign over all persons and causes ecclesiastical and temporal, to the exclusion of any and every foreign power. The terms 'Supreme Head' and 'Supremacy' do not here profess to attribute spiritual powers to the Crown; they assert, as against the alleged Supremacy of the pope, that the King was, for all constitutional purposes, the head of a National Church.

We can recognize the sense in which the Church was thus built into the fabric of the State by an examination of the other Statutes which worked out the constitutional change, and of their effects.

For though the Act which declared the King to be Head of

¹ 2 & 3 Ed. VI, c. 21.

² 26 Hen. VIII, c. 1.

³ 1 Eliz. c. 1.

the Church was repealed, the sense in which such Headship was recognized may be collected not only from the Act of Supremacy but from those other Acts by which the constitutional change was worked out. They fall under three heads —

(1) The recognition of the ultimate judicial power of the Crown ;

(2) the recognition of the legislative subordination of the estate of the clergy ;

(3) the sanction given by Parliament to the Liturgy and Articles of Religion as formulated by Convocation.

§ 2. *The judicial power of the Crown.*

Appeals to Rome forbidden. 1533. The Act for restraint of Appeals to Rome was passed in 1533. It recites the capacity of the body spiritual to determine doubtful matters for itself : it further recites the statutes of former reigns against the intrusions of the see of Rome, and the inconvenience of appeals to Rome on the grounds of trouble, expense and the difficulty of obtaining evidence. It then proceeds to enact that causes relating to testaments, matrimony and divorce, tithes, oblations and obventions, should be finally determined within the King's jurisdiction ; that no citations, inhibitions or interdicts should interfere with the rights of spiritual persons within the realm to administer the sacraments and services of the Church ; and that the taking of appeals to Rome, or the introduction of any form of process from Rome, should be visited with the penalties of a *Praemunire*.

An appellate jurisdiction provided at home :

Then the Act provides for Appeals. Cases which begin in the court of the Archdeacon or his official may be taken thence on appeal to the Bishop or his commissary, and thence to the court of the Archbishop of the province. Cases which begin in the court of the Archdeacon in an archiepiscopal see are to go thence to the Archbishop's Court of Arches or Audience, and thence to the Archbishop. The decision of the Archbishop was to be final in all cases save where the King was concerned ; in these an appeal was given to Convocation.

This Act was amended by the Act for the Submission of the Clergy¹, which provided a remedy for lack of justice in any of the courts of the Archbishops, enacting that an appeal should lie to the King in Chancery, and that he should on every such appeal appoint a commission under the Great Seal to such persons as he should name to 'hear and definitely determine such appeal and the causes concerning the same.'

The Court of Delegates, thus constituted, heard appeals and gave judgement, without assigning reasons, if a majority concurred: if not, 'a commission of adjuncts' was issued increasing the numbers of the Court².

Parliament, in 1832³, took the dealing with ecclesiastical appeals from the Crown in Chancery and assigned it to the Crown in Council; with power to the Crown to make orders as to the hearing of such appeals.

In 1833⁴ was constituted the Judicial Committee of the Privy Council, a court which hears ecclesiastical and other appeals, and reports, as a committee of Council, to the Crown in Council for decision. Of this Court of Appeal I shall have occasion to speak later on.

Of the ecclesiastical courts I will also speak later; here it is enough to note that the law of the Church is a part of the law of the land; that the Crown nominates the Bishops and Archbishops who administer it in person or through their representatives; and that from their decisions an appeal lies to the Crown in Council.

§ 3. *The Submission of the Clergy, and the procedure of Convocation.*

The Submission of the Clergy⁵ was an acknowledgement by the Convocations of the clergy that they could be summoned only by the King's writ, that they could enact no canons without the King's license, and that such as were

¹ 25 Hen. VIII, c. 19.

² Lord Selborne, *Judicial Procedure of the Privy Council*, p. 34.

³ 2 & 3 Will. IV, c. 92. ⁴ 3 & 4 Will. IV, c. 41. ⁵ 25 Hen. VIII, c. 19.

enacted could have no force without the royal assent, nor bind the laity without the royal assent in Parliament.

The Submission was embodied in a Statute¹, which also provided for a Commission, to be appointed by the King, to revise the canon law. Meantime such canons as were in force in the Church, and were not at variance with the law, were provisionally affirmed.

The summons of Convocation.

The Act affects (1) the rights of the Convocations to meet, and (2) their legislative power when assembled; so I will first deal with the procedure by which Convocations are summoned, prorogued and dissolved², and then with their legislative powers.

Forms of Summons.

First, an Order in Council is made for the issue of writs to the Archbishops of the two provinces, thus:—

At the Court at — 26 June, 1886.

Present, the Queen's most excellent Majesty in Council.

Order in Council for writ.

It is this day ordered by Her Majesty by and with the advice of her Privy Council that the Right Honourable The Lord High Chancellor of that part of her United Kingdom, called Great Britain, do, upon notice of this Her Majesty's order forthwith cause writs to be issued in due form of law for electing new members of the Convocation of the clergy, which writs are to be returnable on Friday the 6th day of August, 1886.

Then follows in each case the writ of summons:—

Writ of summons to Archbishop.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To the Most Reverend Father in God, our right trusty and well beloved Councillor, —, by the same Grace Archbishop of Canterbury, Primate of all England, and Metropolitan, Greeting; by reason of certain difficult and urgent affairs concerning Us, the security and defence of the Church of England, and the peace and tranquillity, public good, and defence of our kingdom and our subjects of the same, We command you, entreating you by the faith and love which you owe to Us, that, having in due manner considered and

¹ 25 Hen. VIII, c. 19.

² See for all these forms Pearce, Law relating to Convocations of the Clergy.

weighed the premises, you call together with all convenient speed in lawful manner all and singular the Bishops of your Province, and Deans of your Cathedral Churches; and also the Archdeacons, Chapters and Colleges, and the whole Clergy of every Diocese of the same Province, to appear before you in the Cathedral Church of Saint Paul, London, on Wednesday, the twenty-second day of September next ensuing, or elsewhere, as it shall seem most expedient, to treat of, agree to, and conclude upon the premises and other things which of them shall then at the same place be more clearly explained on our behalf. And this as you love Us, the state of our kingdom, and honour and good of our aforesaid Church, by no means omit. Witness ourselves at Westminster, the — day of —, in the — year of our reign.

In obedience to this writ the Archbishop of Canterbury issues a mandate to the Dean of the Province, the Bishop of London, reciting the writ and requiring that he—

Mandate
to Dean of
Province.

peremptorily cite all and singular Bishops Suffragans of our Cathedral Church of Christ Canterbury, constituted within the province of Canterbury, and wills that by them you peremptorily cite and monish the Deans of the Cathedral and Collegiate Churches and their several Chapters, and the Archdeacons and other dignitaries of churches exempt and not exempt personally, and each Chapter of the Cathedral and Collegiate Church by one, and the clergy of every Diocese within our province by two sufficient proctors to appear before us on the day named.

Citation of
Bishops.

The mandate threatens canonical punishment for contumacious non-attendance, and requires a return, from the individual Bishops, of the persons cited by them, and from the Dean of the Province, of his obedience to the mandate.

In the province of York the Archbishop addresses himself directly to his suffragans and clergy.

The Bishops issue mandates to the Deans in their dioceses to attend in person and to procure the election of a proctor by the chapter, and to the Archdeacons to attend in person and to summon the clergy, who in the province of Canterbury are represented by two proctors for each diocese, in the province of York by two proctors for each archdeaconry.

Of Deans,
Arch-
deacons,
Proctors.

Citations are issued by the Deans and Archdeacons in pur-

suance of these mandates, returns are made to the mandates and citations, and thus Convocation is finally assembled.

The Convocations are prorogued or dissolved by writs issued under the Great Seal.

It will be noticed that the parochial clergy are more largely represented in the province of York than in that of Canterbury.

Legislative Powers and Procedure.

The two Houses.

In each Convocation the Bishops form the Upper House, the Deans, Archdeacons, the proctor representing each chapter, the two proctors for each diocese as in Canterbury, or for each archdeaconry as in York, form the Lower House.

The Archbishop of the province presides in the Upper House: the Lower House chooses a Prolocutor.

Legislative powers.

The legislative powers of Convocation are confined to the making, repealing or altering of canons: and the effect of these canons, unless Parliament affirm them, is to bind the clergy only¹. When it is desired that the expressed wishes of Convocation should become a part of the general law of the land, binding alike on laity and clergy, two methods are possible.

Synodical resolutions adopted by Parliament.

(1) The two Houses of Convocation meeting in Synod may pass resolutions which are subsequently adopted and embodied in a Statute by Parliament. This has been done in respect of the Book of Common Prayer, as regards its present form, when settled in 1662², and as regards the shortened forms of service permissible since 1872³.

Canonical legislation:

(2) Convocation may pass canons which are subsequently affirmed by Parliament. The only illustration which I can offer for this statement is the provisional affirmation of existing

¹ See per Lord Hardwicke, *Middleton and Wife v. Croft*, Strange 1056.

² The Act of Uniformity of 1559 revived the Prayer-book which had first been settled by Convocation and then affirmed by Parliament in 1552. Although this Act of 1559 was not immediately preceded by a vote of Convocation, it was in substance a revival of the Parliamentary sanction of 1552 which had been revoked, without any reference to Convocation, by an Act of the first year of Mary's reign.

³ Chronicle of Convocation for 1872, p. 299.

canons in the Act for the submission of the clergy. Such ^{(a) affirmed by} affirmation may necessitate from time to time an inquiry by ^{Parliament ;} a court of law into the canons or constitutions accepted and in force before the Reformation. Thus in the case of *Escott v. Mastin*¹, the validity of baptism by a layman was called in question, and its efficacy was maintained on the authority of the general practice of the Western Church since the fourth century, and, in particular, of the constitutions of Archbishop Peckham in 1281.

But Convocation may pass canons, which, whether or no ^{(b) binding only} they are enforced by Parliament upon the laity, are binding ^{on clergy.} upon the clergy, and the process by which this power is conferred should be followed.

The first stage is the communication by the Crown to Convocation of *Letters of Business*. These may be granted on ^{Process of legisla-} the petition of Convocation or spontaneously by the Crown. ^{tion.} They amount to an expression of willingness on the part of the Crown that Convocation should discuss the matter described in the letters, either generally, with a view to concurrence in Parliamentary legislation, or specially with a view to the alteration of a canon. ^{Letters of business.}

These letters of business, when issued with a view to canonical legislation, are accompanied by a License in the form of letters patent, giving power to make or alter the canon in question. The license sets forth (1) the Act for the submission of the clergy, (2) the permission which it accords for the proposed change, (3) a provision that the new canon shall not be contrary to the doctrine, orders or ceremonies of the Church, (4) a provision that the new or altered canon shall not be valid until allowed and confirmed by further letters patent. ^{License to make canon.}

An illustration of the process is afforded by the proceedings in Convocation in 1887.

The 62nd canon of 1603-4 forbade the celebration of marriage save between the hours of 8 a.m. and midday: this rule ^{Illustration.}

¹ 4 Moore, P. C. 104.

possessed a merely ecclesiastical sanction, and was not supported by any secular penalty, until an Act of 1823¹ imposed heavy penalties on the celebration of marriage at any other time than that specified in the 62nd canon. In 1886 the legislature extended this time, legalizing the celebration of marriage between the hours of 8 a.m. and 3 p.m.²

In 1887 the Convocations of the two provinces desired to alter the 62nd canon so as to correspond with the Act of 1886. On February 10 the President of the province of Canterbury stated that he had received from the Crown Letters of Business, with a License authorizing the Convocation to amend the 62nd and 102nd canons³, and to submit the alterations to be confirmed, if approved, by Her Majesty. The proposed amendments were then discussed in both Houses in the Convocations of both provinces, and when finally settled were transmitted through the Home Secretary to the Queen.

License to
promulge.

The royal assent was then signified by a permission to promulgate the new canons given by License under the Great Seal in the following form :—

Victoria by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To all to whom these presents shall come, Greeting. Whereas, in pursuance of the writing under our Royal sign manual, dated the 9th day of September the fiftieth year of our reign, and directed to the Lord Archbishop of Canterbury, President of the Convocation of the province of Canterbury, the said Archbishop and the rest of the Bishops of the said Province, or a majority of them whereof the said President was one and the rest of the clergy of the said Convocation have set down in writing and exhibited unto Us, new and amended Canons, being word for word as follows;

(Then follows the canon in Latin and English.)

Now know ye that we by virtue of our Prerogative Royal and Supreme authority in causes ecclesiastical do hereby of our especial Grace, give our royal assent to such new and amended canons so exhibited as aforesaid, and we do allow the same and do hereby

¹ 4 Geo. IV, c. 76, s. 20.

² 49 Vict. c. 14.

³ The 102nd canon contained a requirement, long obsolete, that marriages should be solemnized during morning service.

grant unto the Most Reverend Father in God our right trusty and well-beloved councillor Edward White, Archbishop of Canterbury, President of the Convocation of the province of Canterbury, and to the rest of the Bishops and clergy therefore our royal license to make, promulge and execute the said new and amended canons so exhibited as aforesaid, any other cause, matter or thing notwithstanding.

In witness whereof we have caused these our letters to be made Patent. Witness our self at Westminster the 16th day of September in the 51st year of our reign.

By warrant under the Queen's sign manual.

(Clerk of the Crown.)

The promulgation of a canon takes place in the presence of both Houses. The President of the Upper and the Prolocutor of the Lower House each holding a portion of the document while it is read by the President. It is then signed by members of both Houses.

Form of promulgation.

Members of Convocation have from time to time contended that the issue of two royal licenses, the one to 'make' and the other to 'promulge,' is an infringement of the legislative rights of the Church as defined by the Act for the Submission of the Clergy. They have maintained that the prerogative rights of the Crown are exhausted in the issue of one license, and that on the receipt of this the Convocation is empowered to legislate as it pleases on the prescribed subject, and to promulgate such legislation with no further royal intervention¹.

Dispute as to licenses required.

But this technical construction of the Act has not found favour with the legal advisers of the Crown. The first license is always provisional—a license to make a canon subject to the approval of the Crown—the second license is an expression of such final approval.

It may happen that the Ministers of the Crown may think that ecclesiastical legislation on the subject suggested by Convocation is undesirable. In that case no license is granted.

Checks on legislation.

¹ Chronicle of Convocation, 1873, Report of a Committee on Privileges, February 13.

Or it may happen that when such legislation is permitted its form is regarded as open to objection, or the Convocations of the two provinces may be unable to agree as to the canons which they would put forth. The license to 'promulge' may then be withheld. Such was the case in 1861 and 1865 with regard to an alteration of the 29th canon¹. The existing practice seems to afford a useful check on hasty or ill-considered ecclesiastical law-making. The laity might be seriously affected by such legislation, and they have no voice in the matter except through the control exercised by the Queen's Ministers in the manner which I have described.

Sanction
of canons.

Canons which bind the clergy only are enforced by various ecclesiastical punishments which I do not propose to discuss here. They may affect the laity in so far as they would justify a minister in refusing to allow a layman to participate in certain rites of the Church.

Canons which bind the laity may be enforced by refusal of the sacraments and by excommunication.

Excom-
muni-
cation.

Excommunication which once carried with it serious civil penalties and disabilities has been altered in its effects by 53 Geo. III, c. 127. The excommunicated person is liable, if he do not carry into effect the order or decree of the Court which passed sentence, to be imprisoned for a term not exceeding six months. He is further liable to be refused the sacrament: if he die in contumacy the burial service may not be performed over him.

Thus much for ecclesiastical legislation by the Convocations of the Provinces of Canterbury and York.

§ 4. *The Acts of Uniformity; the Prayer-book and Articles of Religion.*

Tests of
member-
ship.

The doctrines and the forms of worship distinctive of the Church of England are embodied in the Articles of Religion and the Book of Common Prayer. To maintain doctrine contrary to any of the Articles renders an ecclesiastical person

¹ Chronicle of Convocation, 1872, p. 710.

liable to be deprived of any place or promotion which he may enjoy, by 13 Eliz. c. 12, s. 2. To use the Book of Common Prayer, the forms therein contained and none other is enjoined upon all ministers by 1 Eliz. c. 2, and 14 Car. II, c. 4. Every candidate for ordination is required¹ to express his assent to the Articles and Book of Common Prayer, and to take the oath of Allegiance.

The doctrines and form of worship of the Church of England are therefore sanctioned by Statute. Parliament did not frame the doctrine, nor order the worship, but Parliament has approved them, and has in certain cases provided punishment for a departure from them. Thus in order to enable shortened forms of service to be lawfully used at morning and evening prayer, it was necessary to amend the Acts of Uniformity of 1662. This was done, after a report had been received in favour of the proposed alterations from the Convocations of Canterbury and York, by an Act of 1872².

Thus the Church of England, like the established Presbyterian Church of Scotland, differs from other religious societies in this respect, that the conditions of membership are endorsed by the Legislature and cannot be altered without legislative enactment. In this sense the law of the Church is the law of the land. It cannot be altered at the pleasure of the members of the Church. Convocation could not, even with the most ample license from the Crown, alter or repeal any one of the Articles, or vary the rubric settled in the Prayer-book. To do this recourse must be had to the Crown in Parliament.

Sanctioned by Statute.

Character of an established Church.

SECTION III.

ECCLESIASTICAL PLACES, PERSONS, AND PROPERTY.

In dealing with ecclesiastical persons, places, and property I propose to confine myself as far as possible to the points at which Church matters touch and are affected by the central

¹ 28 & 29 Vict. c. 122, s. 1, and s. 4 amended by 31 & 32 Vict. c. 72, s. 8; the Clerical Subscription Act, and the Promissory Oaths Act.

² 35 & 36 Vict. c. 35.

government: for I am not treating of the law of the Church generally, but of the Church in its relations to the State.

§ 1. *Ecclesiastical places.*

The province.

For purposes of deliberative assembly, legislation, and judicature, the Church of England is divided into two provinces, the northern and the southern—York and Canterbury. The first of these contains nine¹ bishoprics, together with the archiepiscopal diocese of York. The second contains twenty-four bishoprics, together with the archiepiscopal diocese of Canterbury.

The diocese.

Next after the province comes the diocese, the area of the Bishop's authority and jurisdiction: the centre of government is here the cathedral, where the Dean and Chapter assist the Bishop in the celebration of divine service, and advise him in the spiritual and temporal affairs of the see.

The arch-deaconry.

The diocese again is divided into archdeaconries for purposes of administration and judicature, and these again into rural deaneries for purposes purely administrative.

The rural deanery.

The areas of archdeaconries and rural deaneries may be altered and their numbers increased or diminished by schemes made by the Ecclesiastical Commissioners and approved by the Crown in Council².

The parish.

The ecclesiastical unit is the parish, which dates back to the township of Saxon times. The civil functions of the rural parish, the management of non-ecclesiastical parish property and charities, the enforcement of certain permissive Acts, and other local matters, are now transferred to an elected body, the Parish Council³.

The peculiar.

The *peculiar* should be mentioned here though it is mainly concerned with jurisdiction. A *peculiar* in the region of eccle-

¹ This number includes the Bishop of Sodor and Man, who has a seat but no vote in the House of Lords.

² 6 & 7 Will. IV, c. 77; 3 & 4 Vict. c. 113; 37 & 38 Vict. c. 63.

³ See chapter v. sect. i. § 5. Rural Local Government.

siastical judicature corresponded with the *liberty* in secular matters. It was a fragment taken for judicial purposes out of its geographical surroundings and assigned to some extraneous ecclesiastical person. There were in 1832 Peculiars to the number of, nearly, 300, belonging some to the Crown, 'some to archbishops, bishops, deans, deans and chapters, archdeacons, prebendaries and canons, even to rectors and vicars'; there were also some 'of so anomalous a character as hardly to admit of description' ¹.

For purposes of jurisdiction these peculiars are practically abolished ².

§ 2. *Ecclesiastical persons.*

In respect of their spiritual capacity, ecclesiastical persons Spiritual, are Bishops, Priests, or Deacons.

As regards the internal government and discipline of the Church, its officers are Archbishops, Bishops, Deans, with or without chapters, Archdeacons, Rural Deans, Rectors, Vicars, and others who enjoy preferment and are responsible for a cure of souls, differing only from rectors and vicars in the mode of their appointment ³.

The spiritual functions may be dismissed: a Bishop concerns us only in so far as he is a Bishop exercising government and jurisdiction over an episcopal see; a priest only in so far as he holds preferment or differs in status from a layman.

Administrative functions concern us only in so far as they concern central government. Jurisdiction is matter for a chapter on the Courts.

The spiritual capacity of an Archbishop does not differ from that of a Bishop, but the Bishop owes obedience to the Archbishop of his province, and has been regarded by the Privy

adminis-
trative.

The Arch-
bishop.

¹ Ecclesiastical Courts Commission, 1830-32, cited in the Report of the Ecclesiastical Courts Commission, 1883, p. 198

² See 10 & 11 Vict. c. 98, and the continuing Acts, and 3 & 4 Vict. c. 86, s. 22.

³ Such are the perpetual curate, the minister of a chapel of ease, the donee; see Phillimore, Eccl. Law, vol. i. ch. x. pp. 239-259 (ed. 2).

Council, and treated by the Archbishop, as subject to his jurisdiction¹.

Elsewhere I have dealt with the forms of appointment, election, confirmation, and consecration. Of the two Archbishops, the Archbishop of Canterbury takes precedence. He is Primate and Metropolitan of all England. He has the privilege of crowning the King, or the Queen regnant, while the Archbishop of York may crown the Queen consort. His authority for granting faculties and dispensations extends to both provinces.

The topic of jurisdiction, other than visitatorial, must fall into a chapter on the Courts.

The visitatorial jurisdiction, whether of an Archbishop or a Bishop, seems to amount to a right to hold inquiry with a view to making orders and decrees, and with a further object of taking proceedings based on the result of such inquiries. It does not extend to trial and sentence for offences against ecclesiastical law².

The
Bishop.

In virtue of his spiritual qualifications the Bishop exercises powers which create legal rights and liabilities. He ordains; he thus qualifies the person ordained to hold ecclesiastical preferment, and brings him within the scope of ecclesiastical law. He consecrates; he thus gives to a building the character of a church. He confirms; the confirmed person is thus entitled to partake in the Sacrament of the Lord's Supper. He has administrative duties consequent on the exercise of these powers. He takes a necessary part not only in ordination but in the *institution* of an ordained person to a rectory or vicarage to which he has been presented, and he has a discretionary power, upon sufficient cause, to refuse to institute³. He visits his diocese once in every three years, and can inquire into the conduct of the persons and the

¹ L. R. 13 P. D. 221, and see Report of the Proceedings in the Court of the Archbishop of Canterbury, in the Bishop of Lincoln's Case, by E. Roscoe, and 14 P. D. 88.

² *Dean of York's case*, 2 Q. B. 1.

³ *Heywood v. Bishop of Manchester*, 12 Q. B. D. 404.

condition of the fabrics within the range of his jurisdiction. The sanction for such orders as he may make is to be found in the judicial powers of the Bishops, to be dealt with hereafter. A suffragan, or assistant, Bishop is appointed in the manner, and enjoys the powers, described on page 429.

A *Dean*¹ is appointed by letters patent under the Great Seal: so too are the Canons who constitute the Chapter, except where the right of appointment to a canonry is vested in the Bishop. In theory the Dean and Chapter are a council of advisers to the Bishop: in fact, they are responsible for the service of the cathedral, and take a formal part in the election of a bishop, but do not habitually fulfil the function for which they came into existence.

An Archdeacon is appointed by the Bishop of the diocese. Although, unlike the Dean, he is not appointed by the Crown, he is more closely connected with the central government, because he has a court and a jurisdiction subordinate to that of the Bishop, definite responsibilities in respect of the buildings in his archdeaconry, and a right of visitation with a view to carrying out these responsibilities.

A Rural Dean is an officer appointed by the Bishop with a duty to make inspection and report generally on the condition of buildings within his deanery, and specially when placed on a commission of inquiry issued by the Bishop under the Clergy Discipline Act² or the Incumbents' Resignation Act³.

Beyond these officers of the Church is the body of beneficed clergy; beyond these again is the body of the clergy unbeficed, or holding offices not as property but by contract, such as curates or chaplains.

With these we are only concerned in so far as the *status* of a person in Orders differs from that of a layman.

¹ The word 'dean' means in its origin that one of ten men who was responsible for the good behaviour of the rest. The secular tithing is a corresponding institution. The Dean is a person of authority, whether he is Dean of a chapter, of a peculiar, or of a college. He became chief of the *decani*. Then the other *decani* disappeared and he became chief of the Society.

² 3 & 4 Vict. c. 86.

³ 34 & 35 Vict. c. 44.

Disabili-
ties.

The person in Orders is subject to certain statutory disabilities. He cannot be chosen to serve in the House of Commons¹, nor hold municipal office², though he is not disqualified from being a member of a county council. He cannot, while holding any ecclesiastical preferment, occupy himself in farming or in trading.

Immuni-
ties.

He enjoys certain immunities. He is exempt from serving on juries, and from arrest while performing divine service, and on his way to or from the performance of service.

Liability
to Ecclesi-
astical
law.

He is subject to canons imposing rules of conduct which do not bind the laity, and the sanction which enforces them may affect his title to the preferment which he holds, and even his personal liberty.

Monition, Suspension, Deprivation are the forms in which the sentence of an ecclesiastical Court may be expressed.

The offender may be *admonished* to do or abstain from doing a specific thing. He may be *suspended* from the exercise of his clerical functions. He may be *deprived* of his preferment. If he contumaciously disregard the sentence of the Court he may be imprisoned. Like the soldier or sailor, he is subject to an exceptional code, enforced by an exceptional procedure, and like them he is protected by the secular Court, which restrains excess of jurisdiction by writ of *Prohibition* and improper restraint of the person by writ of *Habeas Corpus*.

Means of
escape.

He cannot get rid of his Orders except by a special procedure provided by the Clerical Disabilities Act³, which enables him so to divest himself of his clerical character as to become capable of entering the House of Commons or holding municipal office.

I have indicated in the passages which have gone before the mode of appointment to the offices I have described.

Powers of
appoint-
ment.

The Crown (acting on the advice of the Prime Minister) appoints Archbishops, Bishops, and Deans of Chapters; Canons are appointed either by the Crown or by the Bishop of the

¹ 41 Geo. III, c. 63.

² 45 & 46 Vict. c. 50, s. 15.

³ 33 & 34 Vict. c. 91.

diocese; Archdeacons and Rural Deans by the Bishop. The right of presentation to rectories, vicarages, and other like preferment, is a right of property which may be vested in the Crown or in a subject, but the Crown has, by prerogative, the right to present to a benefice, and it would seem also to an archdeaconry or canonry when it has created the vacancy by making the previous holder an English bishop¹.

§ 3. *Ecclesiastical Property.*

The Church of England is not a corporate body. It is a religious society within which many corporations exist. They exist for the purpose of promoting the objects of the society, and they have at different times received endowments mainly from private munificence. The only general liability enforced by law for the benefit of the Church is the payment of tithe. This liability is not, nor was it in its origin, an endowment of the Church by the State. It was a voluntary payment; the duty to make it was preached by the Church, and when the duty came to be generally recognized it was enforced by the State. It is now commuted for a charge upon land, varying in amount with the septennial average price of corn; it is an article of property, of the nature of realty, not tenable only or necessarily by ecclesiastical persons.

Dismissing, therefore, the question of a state endowment of the Church it remains to ask in what way the property of the various corporations within the Church comes into contact with the State otherwise than as all property is protected by the courts of the State.

Queen Anne's bounty is a restoration by the Crown to Church purposes of money derived from Church property. Queen Anne's bounty;

¹ The limits of this prerogative are discussed in the case of *The Queen against the Provost and Fellows of Eton College*, 27 L. J. Q. B. 132, 8 E. & B. 610. 'The general dictum, that if an incumbent is made a bishop the Crown shall present to his preferment thereby vacated, cannot be relied on: for this evidently was meant to be understood of English preferment, and an English bishopric, and the same writers who lay this down say that the rule does not extend to a titular bishop or suffragan under 26 Hen. VIII, c. 14.' It does not extend to a colonial bishop.

'First-fruits,' or the first year's profit of the bishopric, or other ecclesiastical benefice, and 'tenths,'² or an annual tax on the rateable value of all benefices, were exactions made by the Pope upon the estate of the clergy before the Reformation.

Henry VIII appropriated these to the Crown, and they became a source of royal revenue, the amounts being calculated on a valuation made in the reign of Henry VIII.

Queen Anne restored this revenue to Church purposes, obtaining power from Parliament¹ to create by letters patent a corporation upon which should be settled for ever the produce of these first-fruits and tenths. The Governors of Queen Anne's Bounty, constituted in pursuance of this Act, manage this fund, applying it partly in loans, repayable over a series of years, for the building of residences for the clergy, partly in augmenting poor livings, on condition that sums of equal value to those which they apply to such augmentation are advanced by private gift.

supple-
mented
for a time
by Parlia-
ment.

For eleven years, from 1809 to 1820, Parliament granted £100,000 a-year in aid of this fund²; otherwise it has consisted entirely of the first-fruits and tenths claimed from individual benefices by the Pope, appropriated by Henry VIII, and restored, for general Church purposes, by Anne.

The Eccle-
siastical
Commis-
sion.

The Ecclesiastical Commission is a body incorporated by 6 & 7 Will. IV, c. 77, and somewhat altered in its composition by 13 & 14 Vict. c. 94. Its main object is the management of episcopal and capitular estates.

'Under these provisions the income of all the Archbishops and Bishops of the sees then existing were regulated and fixed at their present amounts, some of them having been excessive while others were small and inadequate What was thought superfluous in the establishment of the several capitular bodies was retrenched, the number and stipends of their canons and assistant ministers being fixed by law³.'

After these arrangements had been made the proceeds of the

¹ 2 & 3 Anne, c. 20.

² Lord Selborne, *Defence of the Church against Disestablishment*, p. 162.

³ *Ibid.* p. 164.

estates assigned to the management of the Commissioners produced a surplus available for general Church purposes, and this was treated as a common fund and applied to the endowment of new livings or the increase of poor livings in populous places.

For the adjustment of the revenues of the Church to local requirements the Ecclesiastical Commissioners have very considerable powers, chiefly in the arrangement of boundaries. With these we are not concerned, except to note that the State has taken upon itself the management of large estates belonging to corporations within the Church as the most convenient mode of ensuring the distribution of the income thence arising for the benefit of the entire society.

SECTION IV.

THE SCOTCH CHURCH.

§ 1. *Introductory.*

The English Reformation was led and controlled by the King; the Scotch Reformation was a popular movement. Its doctrines were set forth in audience of the whole Parliament on August 17, 1560.

‘Knox and his compeers were present to support their supplication; the bishops, in their place in Parliament, were invited to impugn the articles proposed; and all the forms of a free and deliberate voting of the doctrine *as truth*—as the creed of the Estates, not of the Church—were gone through. It was a doctrine “professed by the Protestants,” exhibited by them “to the Estates, and by the Estates voted as a doctrine grounded upon the infallible word of God.”’

A form of Church government by presbyteries and a general assembly was the outcome of this movement. In 1647 the creed of 1560 was superseded by the Confession of Faith drawn up at Westminster in that year by an assembly of Puritan divines and accepted by the Scotch General Assembly: the Presbyterian form of Church government having been

Definition
of creed.

¹ Taylor Innes, *Law of Creeds in Scotland*, p. 13.

already affirmed. The national character of the Scotch Church was strengthened and deepened by the persecutions of the last Stuarts, who endeavoured to enforce the episcopal constitution of the English Church. Soon after the Revolution two important statutes were passed, one in 1690 for 'ratifying the Confession of Faith and settling Presbyterian Church government': another in 1693 'for settling the Peace and quiet of the Church,' imposing this confession as a standard of doctrine upon all ministers in the Church. The constitution of the Church Courts had been settled as early as 1592 and has not varied. The settlement of 1690, 1693 was confirmed in 1705 by an Act of Security passed by the Scotch Parliament and incorporated into § 5 of the Act of Union, whereby it is enacted that the 'Act for securing the Protestant religion and *Presbyterian Church government, with the establishment* in the said Act contained,' is to be a 'fundamental condition of the Union,' and 'to continue in all times coming.'

Establishment.

Act of Security.

In some details this settlement has been modified, but in all important features it has been maintained.

§ 2. *Mode of Government.*

Premising that the articles of faith of the established Presbyterian Church have been defined by general assemblies of the Church and their definition perpetuated by Statute; it follows that we must note the existing form of Church government and its connection with the State.

The administrative, judicial, and legislative powers of the Church are in the hands of four bodies.

The Kirk Session.

At the bottom of the scale is the Kirk Session, corresponding to the English vestry, wherein the minister and a small number of elders, not less than two, superintend matters of discipline and worship, and the administration of parochial charities.

The Presbytery.

Above this body is the Presbytery, a word used sometimes to mean an assembly, sometimes the district from which the assembly is gathered. It consists, as an assembly, of all the

ministers within the, geographical, limits of the Presbytery, and the Professors of Divinity (being ministers), of any University within those limits. The number of these bodies is fixed by the General Assembly; it is now between eighty and ninety.

The Presbytery is a Court of Appeal from the Kirk Session, and discharges besides, in relation to the ministry, functions corresponding to those of the English episcopate. It examines candidates for the ministry, confers license to preach, ordains, approves persons presented to parishes, inducts them and supervises their conduct in the ministry.

The Synod stands next above the Presbytery, and acts as ^{The Synod.} an intermediate Court of Appeal from that body. The Synod consists of the members of all the presbyteries within its bounds. Of such bodies there are now sixteen.

The General Assembly is the supreme legislative and ^{The General Assembly.} judicial body in the Scotch Church.

It consists of two ministers from every presbytery; one elder or more from each presbytery, and one from each royal burgh; and either a minister or an elder from each University. Thus, unlike the English Convocation, it contains a fair representation of lay members of the Church.

§ 3. *Relations of Church and State.*

The relations of the Assembly to the Crown are peculiar. ^{Its powers,} It meets on a day named simultaneously by the Moderator who presides over its deliberations, and the Royal Commissioner who is present to represent the Crown but takes no part in discussion.

Legislation takes place without royal initiation or assent, ^{legisla- tive,} in the form of *overtures*. These are resolutions passed by the General Assembly and submitted to the presbyteries throughout the kingdom. When approval of the presbyteries has been signified they become law: but sometimes Acts are passed which have the force of law unless the presbyteries should express dissent. The powers of the General Assembly

are very wide. In legislation it is not hindered by the need for letters of business or license to make or alter canons without which the English Convocation cannot act.

judicial, In judicial matters it is a final Court of Appeal. No superior court of secular judges, corresponding to the Judicial Committee of the Privy Council, can review its decisions; nor does it seem that anything in the nature of a writ of Prohibition can restrain its judicial action.

But the General Assembly is bound by the law of the land, and in the case of an Established Church this limit on its legislative and judicial action does not mean merely that it must not invade civil rights. The law of the land, for an establishment, means not only the general law, but the Statutes by which its faith, discipline, and principles of government have been fixed.

limited by
the estab-
lishment.

This principle was enforced upon the Assembly in the proceedings which led to the disruption of the Scotch Church and the formation of the Free Church in 1843. An Act of 1711¹ restored and confirmed the rights of lay patrons to present to pastoral charges. In 1834 the Assembly claimed for the presbyteries the right to refuse to admit a person whom the Congregation was unwilling to accept. The Courts upheld the statutory rights of the patrons. The Assembly does not seem so much to have claimed the right to exercise a discretion in individual cases, as an inherent right to act independently of statute law in matters appertaining to Church government².

The Free
Church.

Whatever might have been the view of a court of law as to the rights of the Assembly to insist that lay patrons made a reasonable use of their powers, it was impossible to admit the right of the Assembly to override the law of the land.

¹ 10 Anne, c. 12.

² See *Presbytery of Auchterarder v. Lord Kinnoul*, 6 Clark & Finnelly, 646, and compare with *Heywood v. The Bishop of Manchester*, 12 Q. B. D. 404. The Presbytery, it should be noted, claimed to refuse the presentee without alleging any further disqualification than that the Congregation objected to him.

The Assembly was forced to yield, and a large secession from the Established Church was the result of a prolonged and interesting struggle¹.

SECTION V.

THE CHURCH IN IRELAND, INDIA, THE COLONIES.

The Irish Church is now a voluntary society, but the process of its disestablishment, disendowment, and partial re-endowment affords some illustration of the character of an Established Church.

The Irish Church was, by the Act of Union, united to the English Church 'in doctrine, worship, discipline, and government.' But no meeting of the Convocation of the Irish Church had taken place for 200 years².

By the Act of 1869 (32 & 33 Vict. c. 42)—

(1) The union of the two Churches, created by the Act of Union, was from a certain date dissolved, and it was enacted that from that date the Church of Ireland should cease to be established by law. The Process of disestablishment.

(2) Existing ecclesiastical corporations, whether aggregate or sole, were dissolved. Where a corporation is dissolved its proprietary rights also disappear.

(3) All rights of patronage, including the right of the Crown to nominate Bishops and other dignitaries of the Church, were taken away. In case of private patrons provision was made for compensation.

(4) The Archbishops and Bishops, ceasing to be nominated by the Crown, ceased to be spiritual peers, and lost such rights as they possessed to sit in the House of Lords.

(5) Ecclesiastical jurisdictions and ecclesiastical law were

¹ In Chapter 3 of Mr. Taylor Innes' *Law of Creeds in Scotland*, and in the appendices to the Chapter, may be found a full account of the controversy.

² Hansard, cxciv. 423.

abolished. But the ecclesiastical law was to be binding on the members of the Church as constituting the terms of a contract into which they had entered and which would endure until altered by a body representative of clergy and laity.

(6) Power was given to the Crown to incorporate such a body when constituted so as to enable it to hold property.

(7) Until such incorporation the entire property of the Irish Church was vested in a Commission which was intended to carry into effect three purposes, (*a*) compensation for life interests affected by the change; (*β*) the transfer to the newly-incorporated society of the churches, glebe houses, and a sum of £500,000 in compensation for endowments made by private persons since 1660; (*γ*) the retention and management of the residue for such purposes as Parliament might thereafter determine.

Comparison of
Irish,

Thus the Irish Church is a voluntary society with full powers of self-government, including as it would seem the power to alter its doctrines and its constitution.

Scotch,

The Scotch Church is an establishment with ample powers of self-government, limited by the fact that its doctrine and constitution are stereotyped in the statute book—are not matter of private contract but are part of the law of the land.

English
Churches,

The English Church is an establishment which while it enjoys a greater dignity in its connection with the State enjoys also very limited powers of self-government, being controlled at every turn by the Crown and the Courts.

other
religious
bodies.

But no voluntary society, however free, can escape subjection to the general law of the land; it must observe towards its members the terms on which it invited them to join it. And if a majority determine to alter the constitution or creed of the society the law courts must determine disputed rights of property between the majority and the dissentient minority.

And a voluntary society may so fix its articles of faith and conditions of government as to make them practically un-

alterable. This has been done by the Free Church of Scotland in a deed of settlement which appears to be irrevocably binding upon the members of the Church.

It has also been done more precisely by the Primitive Wesleyan Methodist Society of Ireland, which has put its doctrine, discipline, and rules into an Act of Parliament¹, with a provision that the discipline and rules may be altered in a manner prescribed by the Act but that the doctrine is not to be altered.

In India the Crown has power by Statute to create certain India. bishoprics, and to confer and define episcopal jurisdiction².

The tangled history of the Church in the colonies can be but briefly touched upon here. The extent of the royal prerogative in relation to the Church, whether in Crown colonies or settled colonies, has been the subject of much dispute and perhaps of needless confusion. We must keep apart the episcopal *status* and the episcopal jurisdiction, and then we may arrive at a clear understanding of the matter. The Colonies.

One may say that though the Queen cannot consecrate a bishop, yet that in England a bishop cannot be consecrated without her assent³ expressed in one or other of several forms.

The Queen cannot however introduce into a colony the ecclesiastical law and the apparatus for enforcing it. Outside England she cannot create or confer episcopal jurisdiction; save, as in the case of the Indian bishoprics, in exercise of statutory powers. For it is laid down by Lord Coke, and accepted by the Privy Council⁴ as a settled constitutional principle, that the Crown cannot establish new Courts to administer any law but the Common law.

The misadventures of the Church in South Africa have

¹ 34 & 35 Viet. c. 40.

² 53 Geo. III, c. 155; 6 Geo. IV, c. 85; 3 & 4 Will. IV, c. 85.

³ See judgement of the Master of the Rolls in the *Bishop of Natal v. Gladstone*, L. R. 3 Eq. 49.

⁴ *In re the Bishop of Natal*, 3 Moore, P. C., N. S., 115.

The
Church
in South
Africa.

furnished illustrations of the rules which I have laid down. There the Crown was advised to issue letters patent for the creation of a diocese (Cape Town), and the appointment of a bishop with episcopal jurisdiction, and subsequently to subdivide this diocese into three, placing the Bishop of Cape Town in the relation to the other two of Metropolitan to suffragan bishops. The arbitrary and unjudicial action of the Bishop of Cape Town brought into question the validity of the letters patent under which he claimed jurisdiction.

In the first of a series of cases it was held that his letters patent were invalid to confer jurisdiction in a settled colony with a representative legislature¹.

In the next case² which arose, Bishop Gray (of Cape Town) in the exercise of his supposed powers as Metropolitan professed to try, condemn, deprive and excommunicate Bishop Colenso (of Natal), and it was held that the letters patent of the two bishops did not confer upon the one the rights, or impose upon the other the liabilities, asserted by Bishop Gray. In this case, although the Privy Council again speak of the limitation of this exercise of the royal prerogative in colonies with *legislative* institutions, yet the principle laid down and the adoption of the language of Lord Coke would seem to cover the case of all colonies and to conclude the right of the Crown to create any ecclesiastical jurisdiction unless under powers conferred by Parliament.

In the third case³, however, it was held that although Bishop Colenso had not acquired or become liable to any jurisdiction in virtue of his letters patent, yet that he was thereby constituted Bishop of Natal in point of *status* and was entitled to demand the payment of money held by trustees for the endowment of the bishopric.

Royal
authority
for con-
secration :

Since that date it has been the practice, when a colonial bishop is consecrated in England, to issue a license under the

¹ *Long v. The Bishop of Cape Town*, 1 Moore, P. C., N. S., 411.

² *In re the Bishop of Natal*, 3 Moore, P. C., N. S., 152.

³ *Bishop of Natal v. Gladstone*, L. R. 3 Eq. 1.

sign manual and signet for the consecration. So we may note that authority for the consecration of a bishop may proceed from the Crown in five ways.

For an English bishop, a license to elect (*congé d'élire*), of English bishop, followed by a mandate in the form of letters patent for his confirmation and subsequent consecration. The bishop then has the jurisdiction conferred by the ecclesiastical law.

For a suffragan bishop, under the provisions of 26 Hen. VIII, of Suffragan bishop, c. 14, there must be first a submission to the Crown of two names by the bishop who desires the assistance of a suffragan. Then the Crown by letters patent requires the archbishop of the province to do what may be required to confer the degree and office of bishop upon that one of the two persons named whom the Crown may choose. The bishop so created has such powers as may be committed to him by the bishop of the diocese wherein he is to act.

For an Indian bishop, letters patent conferring the dignity of Indian bishop, and the jurisdiction under the provisions of the statutes above cited.

For a colonial bishop, a license is issued in the following of Colonial bishop, form :—

VICTORIA.

Victoria by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the most Rev. Father in God, by Divine Providence Lord Archbishop of Canterbury, Primate of all England and Metropolitan, Greeting.

Whereas you the said Archbishop have humbly applied to Us for our License by Warrant under our sign manual and signet, authorizing and empowering you to consecrate our trusty and well-beloved _____ to be a bishop to the intent that he should execute his functions in one of our possessions abroad: Now it is our will and pleasure and we do by this our license under our sign manual and signet authorize and empower you to consecrate the said _____ to be a bishop: and we do further authorize and empower you to do, perform and execute all and singular those things which belong to your pastoral office in respect of such conse-

cration as aforesaid, according to the laws, statutes and canons in this behalf made and provided.

Given at our Court at this day of , 18 .

By Her Majesty's command.

(The warrant is countersigned by the Secretary of State
for the Colonies.)

of mis-
sionary
bishop.

In the case of a bishop consecrated for the purpose of discharging episcopal functions in foreign countries a license is issued in nearly the same form; differing in this, that it recites Acts¹ by which consecration for such purposes was rendered lawful without the issue of a license to elect or mandate for confirmation, and solely on the authority of a license by sign manual warrant. The warrant is also issued from the Foreign Office instead of the Colonial Office, and is countersigned by the Secretary of State for Foreign Affairs.

In Scotland, Ireland, and in the British possessions outside England a bishop may be consecrated by other bishops without license from the Crown.

¹ 5 Vict. c. 6, amending 26 Geo. III, c. 84.

CHAPTER X.

THE CROWN AND THE COURTS.

IN treating of the Crown and the Courts it is more than ever necessary to recollect that we are treating them from the point of view of the central government. The Queen is 'over all persons in all causes, as well ecclesiastical as civil, within her dominions supreme.' The Queen is the 'fountain of justice.' What then are the Courts, and how composed, by which this royal supremacy is exercised; through which this stream of justice flows for the benefit of the subject.

The Courts
in con-
nection
with cen-
tral go-
vernment:

It will also be necessary to treat more especially of the judicial organization of England and Wales. As in dealing with local government I described in some detail that system which is nearest home and most closely connected with the central departments, so in dealing with the Courts I must pass over lightly the Courts of Scotland and Ireland, of India, of the Colonies, and of the foreign jurisdictions, chiefly insisting on the manner in which all the threads of justice are drawn together and unite in the two great Courts of Final Appeal.

I will arrange the subject thus—

- § 1. The civil and criminal jurisdictions merged in the Supreme Court.
- § 2. The constitution of the Supreme Court of Judicature.
- § 3. Inferior civil and criminal jurisdictions.
- § 4. Jurisdictions outside the High Court.
- § 5. The Courts of Final Appeal.
- § 6. The Crown in relation to the Courts.

proposed
arrange-
ment.

SECTION I.

JURISDICTIONS MERGED IN THE SUPREME COURT.

§ 1. *History of the Courts.*

Civil and
criminal
jurisdic-
tions.

The beginnings of the distinction between civil and criminal jurisdictions are matters of history, too remote for our present consideration. It is enough to note present differences. The civil jurisdiction protects private rights, the criminal jurisdiction punishes offences against public order or well-being¹. The object of a civil action is to secure a right or obtain compensation for its infringement: the object of a criminal suit is to obtain punishment for the offender. Only the person interested may set in motion the course of civil justice, but a crime is against the peace of our Lady the Queen: a prosecution may be commenced by any one in the Queen's name. In a civil case the party complaining may forgo his rights, but the Queen cannot exonerate his adversary. In a criminal case the party injured cannot condone the offence done to the public, so as to stop a prosecution, but the Queen can do so by staying proceedings or pardoning the offender. Distinct as are civil and criminal proceedings at the present day, we cannot expect to find them so in the early days of legal history. The State was not strong enough to punish offences against order. The utmost it could do was to regulate the action of the individual in redressing injuries.

The folk's
peace and
the King's
peace.

The King is not, historically, the fountain of justice. The peace, that is the order in which men should live, was not in the first instance the King's peace. Self-redress, the maintenance by the individual of his own peace, gave way to the

¹ Certain offences against the public are made the subject of criminal proceedings, though not of the moral character which we associate with a crime, because unless treated in this way they could not be dealt with at all, such as an indictment for non-repairs of a highway. Certain others are made subjects of civil proceedings to recover a penalty, in order to prevent a pardon interfering with public rights, e.g. the penalties imposed by the Habeas Corpus Act and those for disqualified persons voting in the House of Commons.

peace of the folk: the peace of the folk, as the kingdom settled, became the peace of the King¹. But no sooner had the peace of the King become the national peace than the decentralization of justice began again, as the King granted jurisdiction to great lords over their lands.

In Saxon times we may say that justice was a matter of State concern to this extent, that the King was the guardian of the nation's peace, that where he granted away his jurisdiction over localities, he reserved to himself the power to deal with certain offences, the 'Pleas of the Crown,' and that in matters of civil right the King and witan were a court of final appeal from the local courts of the hundred and shire, wherein the folk right was in the first instance declared.

Feudalism still further localized justice: the lord of lands had jurisdiction over the dwellers on his lands. But the administrative genius of the Norman Kings and their strenuous determination that their justice should prevail against the local justice did more than counteract the tendencies of feudalism. First the secular and spiritual jurisdictions were separated, and thus, besides matters which merely concerned the clergy, the ecclesiastical courts carried off mixed temporal and spiritual matters—testamentary and matrimonial—and questions concerning tithes, which the bishop had heretofore decided in the shire moot. Then the appellate jurisdiction of the Curia was developed more completely than heretofore, and the practice of issuing writs or mandates brought the local officer into connection with the central government. The King himself sat thrice a year at least, and heard cases and dealt out justice.

But generally the business of the Curia was to hear appeals from the local courts of the hundred and shire, to deal with cases in which the King's interest was concerned or in which two of the King's tenants-in-chief were parties, or by special favour with cases in which two subjects not being tenants-in-chief were parties.

¹ Stubbs, Const. Hist. i. 181, 185.

and of
first
instance.

Writs, whether for directing local inquiry or for bringing cases before the King and his court, emanated from the Curia: and throughout the reigns of Henry I and Henry II itinerant justices were sent on commission to represent the Curia for purposes of justice and finance in the shires. From this Great Court the modern courts slowly emerge.

The begin-
nings of
the King's
Bench,

In 1178 two clerks and three laymen were appointed who should hear the complaints of the people and should not depart from the Curia Regis: they were to reserve cases of special difficulty for the King himself. This provision secured in permanence a staff devoted to the administration of justice, though individually no longer interchangeable with the financial staff of the Exchequer, and with the itinerant justices who went on the ever-varying circuits organized by Henry II¹.

This body of five, though limited to judicial duty, was designed to move with the King throughout the kingdom. It was a sitting of the *Curia in Banco* and nominally if not actually *coram rege*. Here we find the beginning of the Court of King's Bench.

of the
Common
Bench,

A further step was made in the specializing of the judicial functions when suits between subject and subject, *communia placita*, were ordained by the 17th article of the Charter to be held in some certain place. Thus arose the Court of Common Pleas or the *Common Bench* as distinct from the *King's Bench*.

of the Ex-
chequer.

The function of the Exchequer had always involved some inquiries of a judicial character, and while it became a department distinct from others it did not cease to be a court for revenue purposes.

Enlarge-
ment of
jurisdic-
tion.

Long before the end of the thirteenth century we can see the three great Common Law Courts as they existed until the Judicature Act came into operation in 1875. The King's Bench dealt with all cases in which the King's interest or prerogative was concerned, the Common Bench with suits between subjects, the Exchequer with cases arising out of

¹ Stubbs, Const. Hist. i. 601, 602.

the collection of revenue. But the King's Bench and Exchequer desired to enlarge their jurisdictions. It was useless to pass a statute in 1300 forbidding the Exchequer to deal with common pleas except in so far as they might touch the King or the ministers of the Exchequer. Fictions were introduced into the pleadings of each court, by which common pleas were brought within their cognizance, and while each retained its special business and some matters remained special to the Common Bench, all three Courts became, in the fourteenth century, for most purposes accessible to all.

But by the side of these Courts arose a department of government which was hereafter to acquire important judicial functions.

In the history of the gradual break-up of the Curia Regis the severance of the Chancery from the Exchequer was one of the most important incidents. Writs had hitherto issued from the Curia, but when the Chancery became a separate department such documents as required to be authenticated with the Great Seal would thenceforth issue from the Chancery, which was now the *officina brevium*. The Chancery as a department.

The Chancery, however, did not remain a merely administrative department. When the three Common Law Courts had been developed out of the Curia there was still a residuary judicial power in the Crown. Those who were dissatisfied with the decisions of the Courts petitioned the Crown in Parliament, alleging error. Hence came the appellate jurisdiction of the House of Lords. But there were those who did not complain that the Courts were wrong, but that they could not afford the needed redress. Such complainants petitioned the Crown in person or the Crown in Council. I have described elsewhere the mode in which the Council dealt with such petitions, but at an early date it became customary, where the King's grace might be vouchsafed to the petitioner, to refer the matter to the Chancellor. The Common Law Courts could order the restoration of land, and, in some cases, of chattels to the rightful owner, and The Chancery as a Court.

could give damages for a contract broken, or injury sustained. The Chancellor did not meddle with the more remote remedy of damages: his procedure went directly to the root of the grievances complained of. The Common Law Courts could say 'you shall pay or restore because of your wrongful act or omission.' The Chancellor could say 'you shall carry out your undertaking—you shall refrain from your contemplated wrong.' Thus where it was desired to enforce the performance of a contract, or to set aside a transaction induced by fraud, or to compel one who had undertaken the conscientious obligations of a trustee to carry out the terms of his trust, the Chancery was the resort of the suitor.

Equity. Thus arose equity, supplementing the common law, acting always *in personam*, not awarding damages, or touching property, set in motion not by writ but by bill containing a petition addressed to the Chancellor, whereupon the individual was summoned by writ of *subpoena*, and bade to do, on pain of attachment, what a just and honest man would be expected to do under the circumstances of the case. Naturally the two systems come into conflict.

Conflict of Equity and common law. The vague summons by *subpoena* with no cause of action shown was one of the earliest grounds of complaint. The evils of interference with the common law relating to land are recited in the preamble to the Statute of Uses. The ground of conflict in the succeeding century was the claim of the Chancery to restrain the successful suitor in proceedings at common law, by injunction, from taking the benefit of his judgement¹.

The gradual definition of equitable rules and procedure which was effected between the Chancellorships of Lord Nottingham and Lord Eldon must not detain us: we are concerned with the composition of the courts, not with the law administered.

The Ecclesiastical Courts. In order to get a clear notion of the various jurisdictions

¹ See for a short and clear account of these struggles, Kerly, *History of Equity*, 112-117.

merged in the Supreme Court, we must touch upon a matter which I shall have to deal with again later, and must mention a jurisdiction which is still in the main extraneous to the Supreme Court.

The Ecclesiastical Courts when severed from the secular courts carried with them some matters of a secular character—wills of personal property, the administration of the estates of those who died intestate, and matrimonial causes. The jurisdiction in these matters was, in the year 1857¹, transferred to other tribunals, the Probate Court and the Court for Divorce and Matrimonial Causes. Testamen-
tary,
and matri-
monial
causes.

There remains but one more civil jurisdiction of those which now are merged in the Supreme Court. The Court of the Lord High Admiral or his deputy had a customary jurisdiction, defined in the reign of Richard II² as relating to all manner of injuries committed at sea, not within the precincts of any county. It had a special jurisdiction conferred by commission to adjudicate on prizes of war and a criminal jurisdiction of which more hereafter. The
Admiralty
Court.

§ 2. *Courts of first instance in 1873.*

I have indicated the origin of the Courts which were merged in the Supreme Court of Judicature; I must pass over their history, the fictions by which the King's Bench and Exchequer obtained a jurisdiction in suits between subject and subject, and the Exchequer an equitable jurisdiction into the bargain, the gradual simplifications of procedure which were effected between 1830 and 1873.

I must confine myself to a bare account of the Courts, their jurisdictions and their judges as they existed in 1873, and I will confine myself for the moment to civil jurisdiction.

The common law jurisdictions were those of the three great Common Law Courts.

The Queen's Bench was the first in rank of the Common The
Queen's
Bench.

¹ 20 & 21 Vict. cc. 77 and 85. ² 13 Rich. II, c. 5, and 15 Rich. II, c. 3.

Law Courts. There the Queen was always presumed to sit in person. It could deal with all suits between subject and subject, except such real actions as still survived. There were also certain matters special to the Court: the prerogative writ of *Mandamus*, commanding magistrates, or others exercising inferior jurisdictions, to discharge a duty: proceedings commenced by the law officers of the Crown, having the effect of the ancient writ *quo warranto*, by which title to the enjoyment of an office could be tried.

The
Common
Bench.

The Common Bench or Pleas had a general jurisdiction in suits between subject and subject, a special jurisdiction in some formalities which survived the abolition of the real actions and the practice of fines and recoveries, and a special jurisdiction by way of appeal from the decision of revising barristers, and in questions of law arising out of disputed returns under the Parliamentary Elections Act, 1868.

The Ex-
chequer
of Pleas.

The Court of Exchequer lost its equitable jurisdiction in 1841¹, and was in 1873 a court of revenue and a court of pleas, dealing in the first capacity with the rights of the Crown against the subject, in the second, with all suits except such as were special to the other Common Law Courts.

The Courts
of Chan-
cery,

The Court of Chancery, from the time that the Court of Exchequer lost its equitable jurisdiction, had the exclusive dealing with the entirety of the remedies and rights which had grown up under its care. Efforts to apply equitable remedies in the Common Law Courts had failed of success.

of Ad-
miralty,

The Admiralty Court with a jurisdiction defined and extended by 3 & 4 Vict. c. 65, and 24 & 25 Vict. c. 10, dealt with injuries committed and contracts wholly arising at sea, following rules derived in great part from the civil law.

of Probate,

The Court of Probate had absorbed all ecclesiastical and other jurisdictions to grant or revoke Probate of Wills or letters of administration of the effects of deceased persons.

¹ 5 Vict. c. 5.

The Court for Divorce and Matrimonial Causes absorbed all of Divorce. jurisdictions previously existing in such causes, and followed the procedure of the Ecclesiastical Courts, except as to the new law and practice, prescribed in 20 & 21 Vict. c. 85, concerning the dissolution of marriage.

Each of the Common Law Courts, until the year 1830, consisted of four judges. A chief justice and three *puisne* judges in the King's Bench and Common Pleas. A chief baron and three barons of the Exchequer. In 1830 a fourth *puisne* judge was added to each Court, and a fifth in 1868.

The number of judges. Common Law.

The Chancery, as a Court of justice, was manned, until the commencement of the present century, by the Chancellor and the Master of the Rolls, who, from being the chief of the Masters in Chancery, and mainly concerned with the custody of documents, began in the time of Wolsey to discharge the functions of a judge, in aid of the Chancellor. But the theory that he was the Chancellor's deputy was so far sustained that he only sat when the Chancellor was not sitting¹.

Hence in 1813 it became necessary to create a new Court of first instance in Equity, that of the Vice-Chancellor of England. In 1841 the equitable jurisdiction of the Court of Exchequer was taken away, and two more Vice-Chancellors were appointed. Thus in 1873 there were as Courts of first instance in Chancery, the Master of the Rolls, three Vice-Chancellors, and the Chancellor himself, who *was* the Chancery for judicial purposes; for the other judges were merely instruments for discharging duties which the limits of human capacity prevented the Chancellor from discharging in person.

The Admiralty Court was presided over by a single judge, but it was provided in 3 & 4 Vict. c. 65 that the Dean of Arches might sit for the judge, and as a matter of fact the Dean of Arches and the judge of the Admiralty Court were

Admiralty.

¹ There seems to have been some dispute as to the jurisdiction of the Master of the Rolls, and after he had acted for two centuries as a judge an Act was passed (3 Geo. II, c. 30) to settle all doubts on the subject.

the same person. The functions of the Dean of Arches fall under another section.

Probate The Act which constituted the Probate Court empowered the Queen to appoint a judge of the Court; and the Act
Divorce. which constituted the Court for Divorce and Matrimonial Causes manned it with a staff consisting of existing judges, of whom the judge of the Court of Probate was to be the Judge Ordinary.

§ 3. *Courts of Intermediate Appeal in 1873.*

From all these Courts, except the Admiralty and Probate Courts, there was an intermediate appeal, before reaching the Court of final appeal.

The Exchequer Chamber. From the three Common Law Courts, error or appeal lay to the Exchequer Chamber¹, a Court constituted by 11 Geo. IV and 1 Will. IV, c. 70, s. 8, and composed of judges from those two Courts whose decision was not in question.

The Court of Appeal in Chancery. From the Courts of first instance in Chancery an appeal lay to the two Lords Justices of Appeal sitting with or without the Chancellor. This Court came into existence in 1851 to relieve the Chancellor, who till then was the sole intermediate Court of appeal between the Courts of first instance in equity and the House of Lords, where he would also be required to preside.

From the Admiralty there was no intermediate appeal. Cases went direct to the final appellate jurisdiction of the Crown in Chancery, under 25 Hen. VIII, c. 19 and 8 Eliz. c. 5. This jurisdiction was transferred to the Crown in Council in 1832².

From the Probate Court appeal lay directly to the House of Lords³.

¹ The Court of Exchequer Chamber was first constituted a Court of Error by 27 Eliz. c. 8, because the long intervals between sessions of Parliament caused delay in getting decisions from the House of Lords.

² 2 & 3 Will. IV, c. 92.

³ 20 & 21 Vict. c. 77, s. 39.

From the Court for Divorce and Matrimonial Causes appeal lay from the Judge Ordinary to the full Court, whose decision was to be final, save in the case of a petition for dissolution of marriage, when appeal lay thence to the House of Lords¹.

The full Court in matrimonial causes.

§ 4. *Criminal Jurisdictions.*

The Courts of Criminal jurisdiction which are merged in the Supreme Court, are those of the Queen's Bench, the Admiralty, and certain others with which I will presently deal.

The Queen's Bench on its *Crown* side, as distinguished from its *Plea* side, could take cognizance of all crimes, or of all things done against the Queen's Peace. It could do this, and, with certain limitations, could bring up all indictments from other jurisdictions by writ of *certiorari*.

The Queen's Bench.

The Court of Admiralty had a jurisdiction over crimes committed on board ship, either on the sea or in the main stream of great rivers below bridge. But this jurisdiction had become practically unimportant, for by 24 & 25 Vict. cc. 96, 97, 98, all indictable offences committed at sea within the jurisdiction of the Admiralty of Great Britain or of Ireland, are to be deemed the same in character and liability to punishment as though they had been committed in England or Ireland.

The Admiralty.

§ 5. *The Circuit Commissions.*

The great courts of common law jurisdiction civil and criminal were localized, or rather centralized, at Westminster. But to bring all these matters to Westminster to be tried was hard alike on the criminal and the suitor.

Hence came the Courts held under *Commissions*, on which the judges were sent their *itineræ* or circuits.

The Commissions

¹ 20 & 21 Vict. c. 85, ss. 55, 56. The full Court was the Chancellor, the chiefs of the Common Law Courts, the senior puisne judge of each Court, and the judge of the Probate Court.

Of these there were and still are three¹, the Commissions of Assize, of Oyer and Terminer, of Gaol Delivery. The first conferred a civil, the two last a criminal jurisdiction.

of Assize, The commission of assize, as its name implies, was designed in its origin for the trial of the real actions, but the judges who were sent on these commissions were, very early, given power to try other issues², and the juries who were summoned to Westminster for the trial of such other issues were summoned conditionally, *nisi prius*, unless before the date of summons the justices commissioned to take assizes should come into the county.

Hence the commission of assize, in Blackstone's time, had come to mean, in practice, a duty to try 'common issues at *nisi prius*, hardly anything remaining of the real assizes except the name.'

of Oyer
and
Terminer,

The commission of *oyer and terminer* directs the judges therein named, or any two of them, the serjeants, Queen's Counsel, and other officers of the Circuit, to 'inquire, hear, and

¹ The judges on circuit are sometimes said to sit in virtue of five commissions, made up by the addition of commissions of *nisi prius* and of the peace. But all the judges of the Supreme Court are in the commission of the peace for all counties, and *nisi prius* is an incident of the Commission of Assize.

² Stat. Westminster 2nd. 13 Ed. I, c. 30. 'Before the end of Edward the Third's reign, a series of enactments commencing with Magna Charta, including the Ordinance for Justices, 20 Ed. III, cc. 1-6, and ending with 42 Ed. III, c. 11, had conferred upon the justices of assize extensive powers of control over the authorities of the counties through which they passed (see Crompton on Courts, 206, et seq.), complete jurisdiction over all criminal cases (the highest in constitutional importance), exclusive jurisdiction over certain real actions, concurrent jurisdiction with the Courts at Westminster to give judgement in others, and the power of trying at the most important stage all causes of the Courts of Westminster wherein questions were to be tried in the country, which, under the old law of *tenue*, involved almost every disputed question of fact taking place elsewhere than in London and Middlesex. The Statutes which conferred these large powers and extensive jurisdiction before the end of the reign of Ed. III, are Magna Charta, c. 12, Westminster 2nd, c. 30, Statute of Justices of Assize, 21 Ed. I, 27 Ed. I, cc. 3, 4, 12 Ed. II, cc. 3, 4, 2 Ed. III, cc. 2, 16, 4 Ed. III, cc. 2, 11, 12, 5 Ed. III, c. 14, 14 Ed. III, st. 1. c. 16, 9 Ed. III, st. 1. cc. 4, 5, 20 Ed. III, cc. 1-6, and 42 Ed. III, c. 11.' *per* Willes J. *ex parte Fernandez*, 10 C. B., N. S., 46.

determine' concerning treasons, felonies, and misdemeanours within the counties named, '*as well within the liberties as without*'.¹ The commission of *gaol delivery* is addressed to the same persons, and bids them 'deliver the gaol of — of the persons therein being.' of Gaol Delivery.

The practical difference between the two commissions seems to be that the first is to *inquire, hear, and determine*, and thus requires a presentment by a grand jury before the judge can act. Thus he can only proceed on indictment found at the same assizes, whereas the commission of *gaol delivery* enables the judge to clear the gaols of such prisoners as he may there find.²

For Middlesex and the suburbs in Kent, Surrey, and Essex, standing commissions of oyer and terminer and *gaol delivery* have been issued since 1834, and judges sit monthly, in virtue of these commissions, to try prisoners at the Central Criminal Court or Old Bailey.³

Disputed questions of law arising in trials at *nisi prius*, whether before commissioners of Assize or judges at Westminster, went to the Court, in which the suit was begun, sitting *in banco*; thence in the course described above to the Civil. Appeal in disputed points of law.
Exchequer Chamber and the House of Lords.

Disputed questions of law arising out of trials of indicted Criminal persons might be dealt with in one of two ways. They might

¹ A Liberty is a district over which the Crown has granted to an individual or his bailiff the execution of legal process exclusive of the sheriff. Means are taken at the present day to prevent inconvenience arising from such privileges.

² The early editions of Blackstone's Commentaries contain a Record of an indictment and conviction for manslaughter. The indictment is found a true bill by a grand jury before a judge sitting under a commission of *oyer and terminer*. The arraignment, trial, conviction and sentence take place at the next assizes under a commission of *gaol delivery*.

³ 4 & 5 Will. IV, c. 36. It was the practice in the case of prisoners convicted and sentenced to death at the sittings in London before the Recorder, or afterwards before the Central Criminal Court, to make a report to the Sovereign before the sentence was carried into execution. This was discontinued at the commencement of the present reign, in pursuance of 7 Will. IV & 1 Vict. c. 77. The judge orders execution, and this is the sheriff's authority.

Error.

be taken by writ of error, where error was apparent on the record, to the Court of Queen's Bench, or, now, to the Queen's Bench Division; thence to the Exchequer Chamber or, now, to the Court of Appeal; and thence to the House of Lords.

Court for
Crown
Cases re-
served.

Or they might be reserved for the 'Court for Crown Cases reserved,' whose decision was final. This Court was constituted by 11 & 12 Vict. c. 78, and consisted of the justices of either Bench and Barons of the Exchequer or any five of them, of whom one must be the chief of one of the three Courts. It rested with the judge who tried the case to reserve a question of law, and he might only do so when the prisoner was convicted.

There is no appeal from a finding of facts in a criminal case save by application to the Home Secretary to advise the Crown to exercise the prerogative of mercy.

It only remains to note certain ancient local Courts, the Court of Pleas at Durham, of Common Pleas at Lancaster, which by virtue of the *jura regalia* once granted to the lords of these counties palatine enjoyed a jurisdiction separate from the Westminster Courts.

We may now consider the effect of the Judicature Acts of 1873, 1875, upon the jurisdictions with which we have dealt.

SECTION II.

THE SUPREME COURT OF JUDICATURE.

§ 1. *Fusion of Jurisdictions.*

We have now in slight and imperfect outline obtained a general view of the Superior Courts as they existed in 1873, when the Judicature Act was passed, and until November, 1875, when it came into operation together with the Amending Act of 1875.

We have before us the Chancery: the three Common Law Courts, from which judges went as commissioners on circuits

to try civil cases commenced at Westminster and criminal cases arising in the counties where the commission was executed: the Admiralty, Probate and Divorce Courts, with their respective jurisdictions, and the intermediate Courts of Appeal from these various Courts of first instance. Juris-
dictions
fused.

The Judicature Act (1873) in its first section took all these Courts and consolidated them into one Supreme Court of Judicature.

It then cut this Court into two permanent divisions, a High Court of Justice, and a Court of Appeal: and proceeded to confer jurisdictions upon each. Assign-
ment to
High
Court ;

To the High Court of Justice was given all the jurisdictions previously exercised by—

The High Court of Chancery, as a Court of Common Law and of Equity:

The Courts of Queen's Bench, Common Pleas, and Exchequer:

The Courts of Admiralty, Probate and Divorce:

The Courts created by Commissions of Assize, Oyer and Terminer, Gaol Delivery, or any such Commissions:

The Palatine Courts of Pleas at Lancaster and Durham.

By the Bankruptcy Act of 1883, jurisdiction in Bankruptcy was handed over to the Supreme Court, and the jurisdiction of the London Court of Bankruptcy was assigned to the High Court of Justice.

To the Court of Appeal was given the jurisdiction and powers of the Lord Chancellor and Lords Justices of Appeal in Chancery, of the Court of Exchequer Chamber, and of the Privy Council in Admiralty appeals. to Court
of Appeal.

§ 2. *Divisions of Supreme Court.*

We thus have two divisions of one great Court. The first exercising a general jurisdiction, civil and criminal, as a Court of first instance, and of appeal from inferior Courts: the other exercising a general appellate jurisdiction in civil cases from the decisions of the first.

Concentration of jurisdictions.

Thus is concentrated, in one Court, equity and common law; the ecclesiastical and statutory jurisdictions enjoyed by the Courts of Probate and Divorce; the civil and criminal jurisdictions of the Court of Admiralty: the power to compel by *mandamus* the discharge of a public duty by persons or bodies on whom such duty may be cast: the power to restrain by *prohibition* an excess of jurisdiction by inferior Courts: the power by *certiorari* to take cases from them and bring them before itself.

Original.

And these wide powers include the criminal jurisdictions of the Court of Queen's Bench, of the commissions of *oyer and terminer* and *gaol delivery*, and of the Court for Crown Cases reserved.

Appellate.

n. 47.

n. 48.

The Court of Appeal has not only an appellate jurisdiction in civil cases from decisions of the High Court, and, where error of law appears on the record, in criminal cases, but from jurisdictions outside the High Court, in matters of lunacy, of bankruptcy, in cases arising in the Chancery Court of the County Palatine of Lancaster, and in the Court of the Lord Warden of the Stannaries.

§ 3. *Divisions of the High Court.*

The Supreme Court is divided into a High Court and a Court of Appeal: the High Court is itself divided for the sake of convenience, and business of a special character is assigned to each *Division* of the Court.

The Divisions.

In the first instance there were five such divisions:—Chancery; Queen's Bench; Common Pleas; Exchequer; Probate, Divorce and Admiralty. But in 1881 the Queen by Order in Council exercised a power conferred on her by the Act of 1873 and merged the Common Pleas and Exchequer Divisions in that of the Queen's Bench.

n. 34
(1873).

Their business.

The business assigned to each Division corresponds to its ancient jurisdiction, but the change effected by the Act is marked in two ways. (1) Any judge may sit in a Court belonging to any Division, or may take the place of any other

judge. (2) Any relief which might be given by any of the Courts whose jurisdiction is now vested in the Supreme Court, may be given by any judge or Division of the Supreme Court: and any ground of claim or defence which would have been recognized in any of the old Courts may be recognized in any Division or by any judge of the new Court. Where rules of equity, common law, or admiralty conflict, the Act states which rule is to prevail in the future, and in cases not specifically provided for enacts that, where law and equity conflict, equity is to prevail. The fusion of law and equity. ss. 24, 25 (1873).

But this is not the place to discuss the law administered or procedure adopted in the Supreme Court, further than is necessary to explain its constitution. I will note the points in which it comes into contact with the central executive.

§ 4. *The Judges of the Supreme Court.*

The High Court consists of three divisions containing unequal numbers of judges. The Chancery division consists of the Lord Chancellor, who presides, and five judges. The Queen's Bench division contains the Lord Chief Justice of England, who presides, and fourteen judges. The Probate, Divorce and Admiralty division has but two judges, the President and another. Judges of the High Court.

All these judges, save the Chancellor, are appointed by letters patent under the Great Seal on the advice of the Chancellor. Their appointment.

They are required to take the judicial oath and thereafter hold office during good behaviour, but may be dismissed on address of both Houses of Parliament. They are appointed to specific divisions of the High Court, but any one may sit for another in any divisional court¹, and the Queen may, by sign manual warrant, transfer a judge permanently from one division to another². Their tenure.

The Court of Appeal is composed of the Master of the Rolls and five Lords Justices similarly appointed. It usually sits in two divisions of three judges, but for certain purposes s. 31 (1873).

¹ 47 & 48 Vict. c. 61, s. 6.

² 36 & 37 Vict. c. 66, s. 31.

Lords Justices of Appeal. two will suffice. Until 1881 the Master of the Rolls was a Judge of the High Court. Since the passing of 44 & 45 Vict. c. 68 he is a Judge of Appeal only. Since 1891 those who have served in the office of Lord Chancellor are *ex officio* Judges of Appeal, but sit only if they consent to do so on the request of the Chancellor¹.

The circuit Commissioners. The Queen continues to issue the commissions under which the judges went circuit before 1875, but the commissioner acting under such commission is to be 'deemed to constitute a court of the said High Court of Justice.' His powers are not therefore limited by the terms of this commission, for he can do, in respect of the matters brought before him, everything that a judge of the High Court sitting at Westminster could do.

The Judicature Act of 1875 conferred power on the Queen by Order in Council to alter the circuits, and two subsequent Acts gave powers of the same character for grouping counties for the purpose of Winter and Spring Assizes. The circuits have undergone more change by this means in the last sixteen years than at any time since the reign of Henry II.

s. 17 (1875). Rules of procedure. The same Act empowers the Queen by Order in Council, on recommendation of the Chancellor and certain of the judges, to make rules for the pleadings, practice, and procedure of the Supreme Court. The power thus given, the authority under which the rules are made, and the procedure for making them are modified by s. 17 of the Appellate Jurisdiction Act (1878), s. 19 of the Judicature Act of 1881, and the Rules Publication Act, 1893. The rules when made must be laid before both Houses of Parliament within forty days of making, or of the beginning of the next session after their making, and come into force unless within the next forty days either House addresses the Queen to annul them. Under these provisions a code of procedure was drawn up in 1883 and, with subsequent additions, is still in force.

s. 75 (1873). A Council of judges of the Supreme Court should meet

¹ 54 & 55 Vict. c. 53.

annually to consider defects and proposed amendments in the administration of justice, and report the same to the Home Secretary for the consideration of the Executive.

SECTION III.

COURTS OF INFERIOR JURISDICTION.

§ 1. *Civil Courts.*

Until 1846 justice in civil cases was, as a rule, only to be obtained at Westminster, or by means of an action begun at Westminster and tried under a commission of assize on circuit.

The ancient county court had ceased to exercise any jurisdiction. The local courts were either courts in chartered towns¹ with limited powers, or courts of request, bearing the old title of the Court of Requests at Whitehall, but existing by virtue of Statute, to meet the needs of suitors, in towns which were willing to pay for such a convenience. Local courts before 1846.

In 1846 was passed the first County Court Act, whereby the country was divided into circuits to each of which was assigned a local Court of Record. This Court was intended to enable small debts to be recovered cheaply and by a uniform mode of procedure. They were limited in jurisdiction by the amount of the sum recoverable and the character of the action brought. But they have gradually acquired from Parliament an extended jurisdiction in both respects, and are now not so much a relief to the poor suitor as to the judges of the High Court. But into this matter we need not enter. The judges The County Courts

¹ Such Courts of Record existing by virtue of special Acts were: The Mayor's Court of London; The Passage Court of Liverpool (see 56 & 57 Vict. c. 37); The Hundred Court of Record of Salford; The Chancellor's Court in the University of Oxford. Courts existed by charter in Bristol (the Tolzey and Pie Poudre Court), Derby, Exeter, Kingston upon Hull, Newark, Northampton, Norwich, Peterborough, Preston, Ramsey. There are twenty-eight others which do no business. Some have paid officers, in others the Recorder is also judge. See Parliamentary Paper [187] for 1888. Wilson, *Practice of the Supreme Court* [ed. 7], p. 121.

Except in
Duchy of
Lancaster.

Appeal
from them
to High
Court.

of the County Courts are appointed and may be dismissed by the Lord Chancellor, who may, with the rule committee of the judges, make rules for their procedure. An appeal lies from their decision to the High Court of Justice, and the statutes respecting them have been consolidated by an Act of 1888 (51 & 52 Vict. c. 43).

§ 2. *Criminal Courts.*

The inferior criminal jurisdictions are those of the Justices of the Peace trying indictable offences at Quarter Sessions or exercising a summary jurisdiction.

The Com-
missions
of the
Peace:

Every county has its commission of the peace, but there are some exceptional cases. The three Ridings of Yorkshire and the three divisions of Lincolnshire have separate commissions, and there are, here and there, some '*liberties*' or excepted jurisdictions, corresponding to the '*peculiars*' of the ecclesiastical world. On this commission are placed all the judges of the Supreme Court, all the members of the Privy Council, and such persons, being qualified by ownership of land or occupation of a dwelling, worth £100 a year, as the Queen, acting through the Lord Chancellor on the recommendation of the Lord Lieutenant, may choose. The Lord Lieutenant is, in practice, the *Custos Rotulorum*, the chief of the justices, and keeper of the records of the county.

the Justice
of the
Peace.

I have elsewhere spoken of the administrative functions of the justice of the peace. His judicial duties are twofold. At Quarter Sessions, held four times a year, the justices of the peace form a court to try indictable offences with a jury, and to hear, without a jury, appeals from justices sitting as courts of summary jurisdiction, and on matters of rating and licensing, and the administration of the Poor Law. The chairman, elected by the justices, takes the part of the judge at a criminal trial, but he is only the presiding officer and spokesman of the justices who form the court.

The summary jurisdiction of magistrates rests entirely upon

Statute, is exercised in petty sessional divisions, and must be exercised by two justices sitting together¹.

It may explain what has just been said if I deal parenthetically and briefly with the person tried and his possible offence.

Certain offences can, and others cannot, be summarily punished.

A man may commit or be suspected of having committed an offence that cannot be summarily punished. A single justice of the peace may then, after a preliminary examination, take such steps as will ensure that he is at hand when wanted for trial. This is done by commitment to prison or by taking bail for his appearance. An indictment is then framed. The offence may be triable at Quarter Sessions or it may be of a class reserved for a judge of the High Court sitting on Commission. In either case a grand jury is charged by the presiding judge, and finds whether or no the indictment is a true bill. If it finds in the affirmative the prisoner is arraigned, tried, and found guilty or not guilty on the verdict of a petty jury.

Procedure
in criminal
cases.

There are then certain offences which may be tried by summary jurisdiction, by two justices sitting without a jury at petty sessions. Others cannot be so tried, but may be tried at Quarter Sessions with a jury. Others again can only be tried by a Commissioner on circuit or judge of the High Court. And there is yet another class of offences, where the prisoner, at his option, may be summarily tried by two justices at petty sessions, or committed for trial at Quarter Sessions or Assizes.

By what
courts
triable.

But as regards the connection of inferior and central jurisdiction in criminal cases it is enough to say that an appeal by way of re-hearing lies from a Court of summary jurisdiction, under certain conditions, to Quarter Sessions, or the dissatisfied party may demand a statement of a case by justices for the decision of the High Court.

Appeals.

These forms of appeal are statutory, as is also the right to demand of justices at Quarter Sessions the statement of a case

Interven-
tion of
High
Court.

¹ See Summary Jurisdiction Act (1879), 42 & 43 Vict. c. 49.

for the decision of the High Court¹. But the High Court may be moved directly by application for a writ of *certiorari* to quash orders in which justices had no jurisdiction or for a writ of *mandamus* to compel justices to discharge a duty cast upon them.

The
borough
magis-
trate.

The borough magistracy must be distinguished from that of the County. Some boroughs have no Commission of the Peace. They then fall under the jurisdiction of the shire. Some have a Commission of the Peace but no Quarter Sessions. Their justices then can only exercise a summary jurisdiction. Some have a Court of Quarter Sessions, but here the borough justices do not, as in the County, act as judges: the Queen appoints, and the borough pays a Recorder, a barrister of not less than five years' standing who with the jury of the borough tries such cases as are not reserved for the superior Courts.

The
Recorder.

The Sti-
pendiary

The Stipendiary magistracy is an institution which took its rise in the metropolis, where a number of jurisdictions converged. The City of London, the City of Westminster, the Liberty of the Tower, each had a separate Commission of the Peace, and the rest of this aggregate of houses would fall under commissions for Kent, Middlesex, Surrey, and Essex.

in the Me-
tropolis.

To meet the difficulty a series of Acts has constituted a body of paid magistrates, each of whom is in the Commission of the Peace for the four counties named, for Hertfordshire, Westminster, and the Liberty of the Tower. They are twenty-three in number, sitting in thirteen courts. They do not sit together, but each has the power of two justices where two are needed for any judicial act.

The
Assistant
Judge.

For the Administrative County of London Quarter Sessions are held twice a month, and the County Bench is presided over by a paid assistant judge.

¹ The appeal from the Court of Summary Jurisdiction to Quarter Sessions is an appeal on the merits of the case as well as on questions of law. But the statement of a case for the High Court, whether by justices at Petty Sessions or at Quarter Sessions, must be a statement of a question of law.

Other towns have stipendiary magistrates with like powers, but unlike the London police magistrates who are paid partly by the County of Middlesex, partly by the nation, the local stipendiary is paid by the locality.

All alike are appointed by the Crown on the advice of the Home Secretary, and hold office so long as the Queen is pleased to retain them in the Commission of the Peace.

SECTION IV.

COURTS OUTSIDE THE SUPREME COURT.

There are Courts which do not form part of the Supreme Court nor does Appeal lie from them to that Court.

But all, save two, are drawn together into one or other of the Great Courts of Final Appeal. The two exceptions are the Court of the Lord High Steward and Courts Martial.

§ 1. *Anomalous Criminal Jurisdictions.*

A peer is entitled to be tried by his peers, if indicted for treason, felony or *misprision*, that is deliberate concealment of treason or felony. If the trial takes place out of session it takes place in the Court of the Lord High Steward, a peer appointed to the office *pro hac vice* by the Crown, by letters patent under the Great Seal, with commission to try the offence. The Lord High Steward is then required by 7 Will. III, c. 3, to summon all peers who have a right to sit and vote, twenty days before the trial. He presides and determines finally any legal questions that may arise. The verdict of the majority (so as it be twelve in number in case of a conviction) decides the issue.

If Parliament is sitting a Lord High Steward is appointed in like manner, but he is then only a presiding officer, standing in relation to the other peers as the chairman of Quarter Sessions to the other justices of his Bench.

This Court seems to stand in no relation to the other Courts of law, except in so far as the indictment is found in an ordinary Court, and the accused peer may there plead a pardon.

Courts
Martial.

Courts Martial are also avowedly outside the ordinary course of law. But they are so far subject to the Supreme Court that they can be kept within the bounds of their limited jurisdiction by writ of *prohibition*: are liable to have a matter removed from their cognizance by writ of *certiorari*, if it be one in which they intrude on the jurisdiction of the High Court: may be required by writ of *habeas corpus* to set free a person improperly detained in custody: may find their members made liable to actions for damages if they act in excess of their jurisdiction to the injury of another.

But the Courts Martial are exceptional Courts permitted every year for a year by the Army Act. While they act within their jurisdiction no appeal lies save to the superior authority, or to the Crown, who by Statute may confirm the sentence or send it back for revision.

§ 2. Ecclesiastical Courts.

Their connection with central judicature.

The Ecclesiastical Courts are different. They too are liable to restraint upon excess of jurisdiction by writ of prohibition, but for the purpose of giving effect to their sentences they must have recourse to the procedure of the High Court, and they lead up to the final Court of Appeal in the Judicial Committee of the Privy Council. I will not deal with the history of the Ecclesiastical Courts from the time that the Conqueror severed them from the secular Courts. It will perhaps be sufficient to note the jurisdiction which they exercised in 1832, as being in point of power, though not perhaps in point of use, their mediæval jurisdiction; and then to note the changes which have since taken place.

Their powers in 1832.

‘The Ecclesiastical Jurisdiction,’ so ran the report of the Ecclesiastical Courts Commission of 1832, ‘comprehends causes of a Civil and Temporal nature; some partaking both of a spiritual and civil character; and, lastly, some purely spiritual.’

in temporal,

‘In the first class are testamentary causes. Matrimonial causes for separation and for nullity of marriage which are purely questions of *civil* right between individuals in their lay character, and are neither spiritual nor affecting the Church establishment.

'The second class comprises causes of a *mixed* description, as mixed, suits for Tithes, Church Rates, Seats, and Faculties.

'The third class includes Church discipline and the correction of and offences of a *spiritual* kind. They are proceeded upon in the way ^{spiritual causes.} of *criminal suits pro salute animas*, and for the lawful correction of manners. Among these are offences committed by the Clergy themselves, as neglect of duty, immoral conduct, advancing doctrines not conformable to the Articles of the Church, suffering dilapidations and the like offences: also by Laymen, such as brawling, laying violent hands and other irreverent conduct in the church or churchyard, violating churchyards, neglecting to repair ecclesiastical buildings, incest, incontinence, defamation; all these are termed causes of correction, except defamation which is of an anomalous character.

'These offences are punished by monition, penance, excommunication, suspension *ab ingressu ecclesiae*, suspension from office, and deprivation¹.'

The reduction of these topics has been considerable since 1832. Testamentary and matrimonial causes were removed ^{Changes since 1832.} to the Courts constituted by 20 & 21 Vict. cc. 77-85, and are now dealt with in the Probate, Divorce and Admiralty Division. Suits for defamation were abolished by 18 & 19 Vict. c. 41; proceedings against laymen for brawling by 23 & 24 Vict. c. 32; church rates have ceased to be compulsory; tithe has been commuted for a rent-charge; liability for dilapidations depends on an order to be made by a bishop; and jurisdiction in cases of perjury has been inferentially removed to the temporal courts².

But we will now go to the Courts by which this jurisdiction is administered.

The Court of the Archdeacon is the lowest in the scale of the Ecclesiastical Courts. In jurisdiction it would seem to be ^{The Archdeacon's Court.} competent to deal with all such cases as might go before the Bishop's Court, but in practice the cases in which the Archdeacon's Court has been called upon to exercise its functions

¹ Report of Ecclesiastical Courts Commission, 1832, set out in Historical Appendix to the Ecclesiastical Courts Commission, 1883, vol. i. p. 193.

² *Phillimore v. Machon*, L. R., 1 P. D. 481.

are rare in modern times¹. The judicial powers of the archdeacon seem to be exercised in a summary way over matters connected with repairs of church buildings in his archdeaconry. These he may visit every year, and must visit once in three years.

The
Bishop's
Court.

The Court of the Bishop or Consistory Court is next in order of the Courts Christian, or Ecclesiastical Courts.

As to this Court we must note two things, of which the first is the mode in which justice is there administered.

When the business of the spiritual courts grew, as it did rapidly after the Conquest, the bishops found that the judicial business cast on them was greater than they had time to transact. Hence the Courts of the archdeacons began to acquire more business and jurisdiction than was consistent with the authority of the bishop.

Delegation
of
functions,

So the bishops delegated their judicial work to professional lawyers, their officials, chancellors, commissaries, or vicars-general. Such an officer was first appointed to hold at the pleasure or for the life of the bishop, then he came to hold for his own life, and in the last century it became the practice to make the appointment by letters patent under the seal of the diocese.

beyond re-
sumption.

The Dean and Chapter in most dioceses ratify the appointment of the Chancellor or Vicar-General², and the bishop is thus excluded from resuming a power once delegated; but in some dioceses the bishop reserves certain matters to be dealt with by himself³.

¹ Phillimore, *Ecclesiastical Law*, (ed. 2) 197-200.

² The Vicar-General seems to be the exponent of the more especially spiritual jurisdiction of the bishop. The Chancellor of the Diocese is described in patents as 'Vicar-General in spirituals and principal official.' It appears from evidence given before the Ecclesiastical Courts Commission (Report, vol. ii. p. 83) that the Vicar-General exercised the bishop's jurisdiction over the clergy, while the principal official dealt with contentious cases and those of a temporal character.

In the case of bishops the offices are held by the same person; but the principal official and Vicar-General of an Archbishop are two different persons, and in the Court of Audience the Vicar-General represents the Archbishop.

³ See the *patents* of the officials principal, &c. of the provinces and dioceses of England and Wales, *Ecc. Courts Commission*, vol. ii. pp. 659-698.

The second point to note is the effect of two Statutes of the present reign upon the jurisdiction of the bishop.

The Church Discipline Act, 1840 (3 & 4 Vict. c. 86), provides a mode of dealing with offences, by persons in orders, against the laws ecclesiastical, or with scandal or report attributing such offences. The Church Discipline Act;

The bishop in whose diocese the offence is alleged to have been committed may appoint a commission of five, of whom one must be his vicar-general, or an archdeacon or rural dean of the diocese. They may inquire, take evidence on oath, and report to the bishop. If there is found to be a *prima facie* case, the matter passes into the hands of the bishop in whose diocese the accused clerk is beneficed, wherever the offence may have been committed. The bishop may, before the commission has sat or reported, deal with the matter with the consent of the accused; or he may after report try the case himself with three assessors, or he may send the case by letters of request to the court of the province, that is to the Archbishop's Court. its requirements of procedure,

The Act has affected the jurisdiction of the bishop in more ways than one. Directly, it supersedes all other modes of trying clerks for ecclesiastical offences, and requires the bishop to try the case in person, thus limiting his power of acting through a vicar-general or commissary. Indirectly, by giving power to send such cases to the provincial court, it has suggested the constant use of such a power, and so has brought into disuse the diocesan jurisdiction over such offenders. and its effect.

The Public Worship Act, 1874¹, creates a procedure for offences against the ceremonial law of the Church: enabling the archdeacon of the archdeaconry, the churchwarden, or three parishioners of the parish, wherein the alleged offence has taken place, to make a representation to the bishop. The bishop may hold that no proceedings should be taken, or he may, if both parties will accept his decision without appeal, hear and decide the case. Otherwise it must be transmitted to the court of the province: with this we have now to deal. The Public Worship Act.

¹ 37 & 38 Vict. c. 85.

The Courts
of the
Province
of Canter-
bury,
of the
official
Principal,

The Provincial Court is the Court of the Archbishop of the province. In the province of Canterbury until 1857 there were four such courts.

(a) The court of the official principal of the Archbishop decided cases on appeal from the diocesan courts; and cases of first instance either because sent by letters of request, or, before the Reformation, in virtue of the legatine authority of the archbishop.

The official principal was the Dean of Arches, so called because he held his court in Bow Church (*Sancta Maria de Arcubus*), thus taking the title of a subordinate judge whose office he absorbed.

of the
peculiars,

(b) The original Court of Arches, dealing with cases arising in the thirteen parishes of London which were exempt from the jurisdiction of the Bishop of London and were 'peculiars' of the Archbishop.

of per-
sonal
jurisdic-
tion,

(c) The Court of Audience, which dealt with matters reserved by the Archbishop for his personal jurisdiction¹. These he decided for himself with the aid of assessors, or, if his vicar-general acted as judge, he acted not in his own name but in that of the Archbishop.

of civil
jurisdic-
tion,

(d) The Prerogative Court, which exercised the testamentary and matrimonial jurisdiction vested in the Church Courts. Most of the business thence arising was done in the Provincial Courts, though the diocesan courts could deal with such cases. This jurisdiction was taken away in 1857, and conferred on the newly-constituted Probate and Divorce Courts.

of York.

The Courts of the Province of York were the Chancery Court, and, before 1857, the Prerogative Court; the former

¹ It is presumably in the Court of Audience that the Archbishop sits as a judge of first instance to try a suffragan bishop of the province. For though his Grace the Archbishop in the judgement in which he decided in favour of his jurisdiction in the recent case of *Read v. The Bishop of Lincoln* speaks of the Court of Audience as distinct from the Court in which he then presided, it is not easy to see what other provincial court would be appropriate. *Roscoe, Bishop of Lincoln's Case*, 33.

exercising the appellate and original jurisdiction in ecclesiastical matters.

The mode of appointment of the officials principal of the two provincial courts has been altered by the Public Worship Act of 1874. Before that Act each Archbishop made his appointment by letters patent under the archiepiscopal seal, the person designated having previously subscribed to the Thirty-nine Articles. The officials principal.

The Act of 1874 provided that the judge created for the purposes of the Act should be appointed by the two archbishops, but that their appointment needed confirmation by the sign manual warrant of the Queen; and further that the judge so constituted should, as the places of officials principal in each province became vacant, enter upon those offices *ex officio*.

Thus the appointment of their officials principal by the two archbishops is made subject to the approval of the Crown.

Here we must leave the Ecclesiastical Courts till we take them up again in dealing with the Court of Final Appeal.

I must pass briefly over the courts in Scotland, Ireland, and the Colonies. I have touched elsewhere upon those of the Channel Islands and the Isle of Man.

§ 3. *Courts of Scotland.*

The Scotch Court of Session corresponds in Scotland to the Supreme Court of Judicature in England. It is the highest civil tribunal, and the jurisdictions of other Scotch Courts, though not so completely merged in it as are similar English jurisdictions in that of the Supreme Court, have come to be exercised by its members. The Court of Session.

The Court consists of a Lord President, a Lord Justice Clerk, and eleven Lords Ordinary. It is divided into an Outer and an Inner House. The Inner House sits in two divisions of four judges, the Lord President in one, the Lord Justice Clerk in the other. The Outer House consists

of five judges sitting singly; its jurisdiction is subordinate to that of the Inner House.

It should be noted that in Scotland the distinction between law and equity, which has been so marked a feature in the history of English law, has never existed, and that the jury to determine questions of fact in civil cases is a modern institution derived from England, and consists of a body of twelve. The jury in criminal cases is a part of the ancient procedure, and consists of a body of fifteen.

There are now absorbed into or associated with the Court of Session the following courts:—

The Jury Court.

The Jury Court, which from 1815 to 1830¹ determined disputed questions of fact remitted to it from the Court of Session: it is now a department of the Court of Session for this purpose.

The Exchequer.

The Court of Exchequer, constituted at the time of the Union as a revenue court, from which error lay direct to the House of Lords: it is now² wholly merged in the Court of Session.

The Court of Teinds.

The Court of Teinds deals with the tithe of parishes throughout Scotland. Its functions are partly administrative, corresponding to those of the Ecclesiastical Commissioners in England, partly judicial, being concerned with the valuation of the tithe and the enforcement of payment. Its judges are the judges of the Court of Session, and its decrees are enforced by the process of the Court of Session, but it remains a separate court with a separate official staff.

The Court of Admiralty.

The Court of Admiralty was a distinct court with a civil and criminal jurisdiction until 1830, when its civil jurisdiction was assigned to the Court of Session, its jurisdiction in matters of prize to the English Court of Admiralty and its criminal jurisdiction to the Court of Justiciary.

The Court of Justiciary.

The Supreme Criminal Court in Scotland is the High Court of Justiciary, of which the Lord Justice General is President. This office is now united with that of the Lord

¹ 11 Geo IV, & 1 Will. IV, c. 69.

² 19 & 20 Vict. c. 56.

President of the Court of Session, in whose absence the Lord Justice Clerk presides, while five Lords of Session are Lords Commissioners of Justiciary.

They sit singly, with a jury of fifteen, to try criminal cases, and in a court of two or more to review the decisions of inferior courts: from their decision there is no appeal.

Circuits are held twice a year for civil as well as for criminal cases, for which purpose Scotland is divided into three districts.

The principal of the inferior courts of Scotland is that of the sheriff, which enjoys a civil and criminal jurisdiction corresponding somewhat to that of the county court and the Court of Quarter Sessions in England. Inferior Courts.

The sheriffs, like the Lords of Session, are appointed by the Crown, and hold office during good behaviour, or *ad vitam aut culpam*¹.

§ 4. *Irish, Indian, and Colonial Courts.*

With the Irish Courts, their points of resemblance and difference from the English Courts, I do not propose to deal. Irish Courts. The superior courts fall under a Judicature Act passed for Ireland in 1877². The points of resemblance so far exceed the points of difference in the superior courts, and the inferior courts would take so much more space to describe than is proportionate to the scope of this work, that I am compelled to let them pass.

The superior courts in India are the creation of the Indian High Courts Act of 1861³. This Act enables the Queen to establish, by letters patent under the Great Seal, High Courts of Judicature for Bengal, Madras, and Bombay, and also, if she so please, for the North-West Provinces. Upon these courts may be conferred such jurisdiction, civil, criminal, Admiralty and Vice-Admiralty, testamentary, intestate and

¹ For an account of Justices of the Peace and other inferior Courts in Scotland I must refer the reader to Lorimer's Handbook of the Law of Scotland, pp. 485-505.

² 40 & 41 Vict. c. 57.

³ 24 & 25 Vict. c. 104.

matrimonial, original and appellate, as the Queen may from time to time by letters patent direct.

Colonial. The Colonial Courts are constituted (1) by the Crown either in virtue of its prerogative, or under statutory powers such as were conferred by the British Settlements Act, and similar Acts in the case of individual colonies; or (2) in the case of colonies with legislative institutions, under the Colonial Laws Act of 1865, 28 & 29 Vict. c. 63, s. 5:—

‘Every Colonial Legislature shall have, and be deemed at all times to have had, full power within its jurisdiction to establish Courts of Judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein; and every Representative Legislature shall, in respect to the Colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such Legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the time being in force in the said Colony.’

Vice-
Admiralty
Courts.

Admiralty Courts in the colonies have had a different history to others. Admiralty jurisdiction existed to deal with matters arising at sea, outside the purview of other courts. So the creation of Vice-Admiralty Courts in the colonies was not the establishment of a new jurisdiction, but of machinery for giving effect to one already existing.

Acts of 1863 and 1867¹ gave facilities for establishing such courts in all the colonies by instrument under the seal of the Admiralty, and these Vice-Admiralty Courts were emanations of the Admiralty Court at home. But in 1890² these imperial courts, existing side by side with the colonial courts, were abolished, and their duties and powers transferred, or the colonial legislatures were empowered to transfer them, to the colonial courts.

¹ 26 & 27 Vict. c. 24, 30 & 31 Vict. c. 45.

² 53 & 54 Vict. c. 27.

SECTION V.

THE COURTS OF FINAL APPEAL.

The last resort of the suitor is to the Crown in Parliament or to the Crown in Council. To use more familiar terms, the final Courts of Appeal are the House of Lords and the Judicial Committee of the Privy Council.

I have noted the rarity of the cases in which decisions on matters of criminal law are liable to review otherwise than by the Court for Crown cases reserved, and the exceptional character of the criminal jurisdiction of the Court of the Lord High Steward and of the Courts Martial. We may, therefore, consider that criminal law is excluded from this section unless specially named.

It remains to consider how the Courts with which we have dealt are grouped respectively under the House of Lords and the Judicial Committee of the Privy Council.

§ 1. *The House of Lords.*

The jurisdiction of the House of Lords rests now upon the Appellate Jurisdiction Act, 1876, of which the third section enacts that, subject to certain provisions in the Act, an appeal shall lie to the House of Lords from any order or judgement of any of the Courts following:—

‘(1) Of Her Majesty’s Court of Appeal in England; and (2) of any Court in Scotland from which error or an appeal at or immediately before the commencement of this Act lay to the House of Lords by common law and by statute; and (3) of any Court in Ireland from which error or an appeal at or immediately before the commencement of this Act lay to the House of Lords at common law or by statute.’

I have written elsewhere of the process by which the House of Lords became a Court of error from the English courts of common law, and a Court of Appeal from the

The Appellate Jurisdiction Act.

English appeals.

English courts of equity. It is enough, therefore, to say here that, with few exceptions ¹, every litigant may obtain a review of any order or judgement of the High Court of Justice in the Court of Appeal: and that from this last a final appeal may be brought by way of petition to the House of Lords.

The suitor prays for a review of the order or judgement appealed against and that 'the order may be reversed, varied or altered, or that the petitioner may have such other relief in the premises as to Her Majesty the Queen in Her High Court of Parliament may seem meet.'

Error on the record, as distinct from appeal, is abolished ².

Scotch
appeals.

The Scotch Courts from which before the Act of Union, an appeal lay to the Parliament of Scotland were the Courts of Session and of Teinds. No provision was made by the Act of Union for an appeal to the British House of Lords, but the jurisdiction of the House appears to have been accepted without controversy ³. Provision was made for error and appeal from the Scotch Court of Exchequer constituted by 6 Anne, c. 26, s. 9.

Practically Scotch Appeals came to the House of Lords from the Inner House of Session ⁴, and the Act of 1876 has merely given statutory affirmation to existing practice.

Irish
appeals.

As regards the appellate jurisdiction of the Irish House of Lords before 1720 there has been some controversy, into which I will not enter ⁵.

History.

The Declaratory Act of 1720 denied and took away the jurisdiction of the Irish House of Lords. The repeal of this

¹ See, as to these, Wilson, *Judicature Acts*, ed. 7, p. 435.

² But an appeal on a matter of criminal law may still be taken to the House of Lords where error is apparent on the record and the point has not been raised before the Court for Crown cases reserved.

³ MacQueen, *Appellate Jurisdiction of House of Lords and Privy Council*, 286-288.

⁴ Report of Committee of House of Lords on Appellate Jurisdiction, p. 69. *Parl. Papers*, 1872 [325].

⁵ As to the case of *Annesley v. Sherlock*, and the precedents collected as to the jurisdiction of the English House of Lords, see MacQueen, p. 92, and Appendix v, pp. 787-791. For another view of the matter see Lecky, *History of England*, i. 419.

Act in 1782 and the passing of the Act of Renunciation in 1783 restored and reaffirmed it.

The Act of Union in 1800 provided that—

‘all writs of error and appeals depending at the Union or hereafter to be brought, shall from and after the Union be decided by the House of Lords of the United Kingdom.’

Such was the state of things to which the Appellate Jurisdiction Act applied. Since then the Supreme Court of Judicature Act for Ireland (1877) has constituted a High Court and a Court of Appeal for Ireland similar to those of England, and has provided for an appeal from the latter Court to the House of Lords in all cases in which an appeal would have lain either to the Queen in Council or to the House of Lords from the Courts which were fused in the Irish Supreme Court. Present practice.

With the composition of the Court of the House of Lords I will deal later.

§ 2. *The Queen in Council.*

The Appeal to the Queen in Council is not so simple of explanation as the appeal to the Queen in Parliament or House of Lords. Appeals to Council.

When the Long Parliament dissolved the Court of Star-chamber and restrained the jurisdiction of the Council, it took away all powers which by any Statute were conferred upon the Star-chamber, or all or any of its judges, and forbade the Council to deal, as it had dealt, with matters cognizable by the Courts of Common Law.

But the King in Council was still the resort of the suitor who could not obtain justice in one of the dependencies of the Crown, and the Act which took away the original jurisdiction of the King in Council at home did not touch petitions from the adjacent islands or the plantations.

From the very beginning of the fourteenth century receivers and triers of petitions were appointed to aid the dispensation of justice in Parliament. Their history. Of these there were two groups, one

for Great Britain and Ireland, one for Gascony, the lands beyond the sea, and the isles. Their functions seem to have been distinct from those of the House of Lords as a Court of Error, and though they continued to be appointed at the commencement of each Parliament until the summer of 1886, their office fell early into abeyance. For the lapse of time which intervened between sessions of Parliament after the middle of the fifteenth century bore hardly on the petitioner from beyond sea: and if he appealed to the King in Council instead of to the King in Parliament, his case was heard by the same persons (for the triers of petitions were members of the Council), and was dealt with more promptly.

Appeals
from the
Channel
Islands.

The Channel Islands were the first applicants for justice in this form, and appeals from Jersey were granted in the reign of Henry VIII¹. Thenceforth the islands used this Court freely, by way of regular appeal from decisions which the suitor disputed as wrongly given, or by way of *Doleance* for an alleged denial of justice.

From the
plantations.

The plantations were the next applicants. In 1661 a standing committee was appointed to hear appeals, and *doleances* from the Channel Islands, and in 1667 this duty was assigned, together with the hearing of appeals from the plantations, to the Committee for Trade and Plantations. In 1687 this Committee was made an open Committee of the whole Council, and in 1696 an Order was made that appeals were to be heard by a Committee of all the Lords or any three of them.

From the
Isle of
Man.

In 1716 an inhabitant of the Isle of Man appealed against a decree of Lord Derby, the feudal lord of the island, and the Council heard him on the ground, stated by Lord Chief Justice Parker, that the King in Council must needs have a jurisdiction in such a case to prevent a failure of justice².

Thus one may say that down to the year 1833 all the petitions '*des autres terres et pays de par la mer et les isles*' were dealt with by an open Committee of Privy Council,

¹ MacQueen, 686.

² *Christian v. Corren*, Peere Williams, i. 329.

which advised the Crown as to the Order to be made in each case.

But in addition to these, the Council heard and determined In lunacy. matters relating to the custody of the person and property of lunatics. For the House of Lords had declined to deal with such cases, holding that the matter was one of royal prerogative entrusted by the King to the Chancellor¹.

Besides these matters there was transferred to the Privy Council in 1832 the jurisdiction of the Court of Delegates in Ecclesiastical and admiralty appeals.

It will be remembered that 25 Henry VIII, c. 19², gave to the subject a right of appeal, for lack of justice in any of the courts of the archbishops of the realm, to the King in Chancery, who thereon appointed delegates with a commission under the great seal to review and finally determine the matter in issue.

A similar court was provided by statute for admiralty appeals in the reign of Elizabeth³.

In 1832 this form of appeal was taken away and the parties to admiralty and ecclesiastical appeals were referred for redress to the Crown in Council⁴.

In 1833 was constituted the Judicial Committee of the Privy Council⁵. With the composition of this body I will deal presently. Its jurisdiction is our present concern. To it were referred—

(1) All appeals or complaints in the nature of appeals made to the Crown in Council (§ 3). Its jurisdiction.

(2) All matters which, arising in Admiralty or Vice-Admiralty courts in the dominions of the Crown, might heretofore have been taken by way of appeal to the Court of Admiralty (§ 2).

¹ Peere Williams, iii. 108, and note.

² The Act for the Submission of the Clergy; see p. 405 *supra*.

³ 8 Eliz. c. 5. The Act for the Submission of the Clergy refers to the procedure in Admiralty appeals as that to which ecclesiastical appeals should be made to conform. So it would seem that the Act of Elizabeth gave statutory force to existing practice.

⁴ 2 & 3 Will. IV, c. 92, s. 3.

⁵ 3 & 4 Will. IV, c. 41.

In
character,

The Judicature Acts (which merged the English and Irish Courts of Admiralty in the Supreme Courts of the two countries) and the Appellate Jurisdiction Act transferred Admiralty appeals to the House of Lords. But the Vice-Admiralty Courts do not seem to have been thus affected. They are now merged in the Colonial Courts, whence appeals go to the Crown in Council.

(3) Any such other matter as the Crown may choose to refer to the Judicial Committee for hearing or consideration (§ 4).

The Act proceeds to confer upon the Judicial Committee various powers needed for the working of a court, as to taking evidence, enforcement of attendance of witnesses, and the carrying into effect of its orders. Rules of procedure have been made by Orders in Council from time to time, and the amount in issue which makes an appeal permissible from the Indian and Colonial Courts has been fixed by such orders, by royal instructions or by acts of colonial legislatures.

But the clause which enables the Crown to refer to the Judicial Committee such matters as it thinks fit ensures the right of the subject to appeal against any miscarriage of justice, and the prerogative of the Queen to correct such miscarriage.

In extent. Thus an appeal is possible against the judgement of a court created under treaty with a foreign power, exercising jurisdiction in a foreign country¹.

Thus the 'Queen has authority by virtue of the prerogative to review the decisions of all Colonial Courts, whether the proceedings be of a civil or criminal nature, unless Her Majesty has parted with such authority.'

And in the exercise of this prerogative the Court advised the Queen to receive an appeal against the decision of a police magistrate in the Falkland Islands²: and again, against

¹ *Hart v. Gumpach*, L. R. 4 P. C. 439, an appeal from the Supreme Court of China and Japan, created under the treaty of Tientsin.

² *The Falkland Islands v. The Queen*, 1 Moore, P.C., N.S., 299 (1863).

a decision of the Supreme Court of New South Wales granting a new trial in a case of felony¹.

Thus again, the act of a colonial legislature by which the decision of a Colonial Court in matters of insolvency was made final was held not to preclude the exercise of the prerogative in allowing an appeal as a matter of grace².

And thus appeal may be made to the Queen to declare the nullity of an assumed jurisdiction in the exercise of which a subject asserts that he has been wronged. Such was the case of Bishop Colenso in 1864³.

§ 3. *The Composition and action of the Courts.*

In the House of Lords no appeal may be heard unless there are present not less than three persons who fall under the designation given in the Act of *Lords of Appeal*. The House of Lords.

A Lord of Appeal may be (1) the Chancellor of Great Britain for the time being, (2) a Lord of Appeal in Ordinary, (3) a Peer of Parliament who has held high judicial office.

A Lord of Appeal in Ordinary is appointed by letters patent, he is entitled to a writ of summons to attend and to sit and vote in the House of Lords⁴, he enjoys the dignity of a baron *for life*, an emolument of £6,000 a year, and holds office during good behaviour subject to removal on address by both Houses of Parliament. The number is limited to four, and they must be qualified by fifteen years' practice at the Bar, or two years' tenure of high judicial office: Lords of Appeal in Ordinary.

'High judicial office' means 'the office of Lord Chancellor of Great Britain or Ireland, of a paid judge of the Judicial Committee of the Privy Council⁵, or a judge of one of Her High judicial office.

¹ *R. v. Bertrand*, L. R., 1 P. C. 520 (1867).

² *Cushing v. Dupuy*, 5 App. Ca. 409 (1880).

³ *In re the Bishop of Natal*, 3 Moore, P. C., N. S. 115 (1864).

⁴ Until 1887 a Lord of Appeal when he ceased to exercise judicial functions lost his right to sit and vote. This has been corrected by 50 & 51 Vict. c. 70, s. 2.

⁵ This office no longer exists. The paid members of the Judicial Committee have died and their places are supplied by the Lords of Appeal.

Majesty's superior Courts of Great Britain or Ireland'; 39 & 40 Vict. c. 59, s. 25.

The Judicial Committee.

The composition of the Judicial Committee has been altered from time to time. It now consists of the Lord President, such members of the Privy Council as hold, or have held 'high judicial office'¹, the Lords Justices of Appeal², and two other persons being Privy Councillors, whom the Queen may appoint by sign manual warrant³. Besides these there may be one or two paid members, who have held the office of judge in the East Indies. They were intended by the Act of Will. IV to be assessors only, but are now to be, for all purposes, members of the Committee⁴. The Church Discipline Act provided that on ecclesiastical appeals under that Act such archbishops and bishops as were Privy Councillors should be members of the Committee, but the Appellate Jurisdiction Act has reduced them to the position of Assessors⁵. It is necessary that four members should be present at the hearing of a cause; and no member may attend unsummoned.

Their judgments.

The Lords move the House.

The mode in which the two Courts give their decisions indicates their characters as representing the Crown in Parliament and the Crown in Council. The House of Lords gives judgement, after hearing counsel, as part of the business of the House. A sitting of the House of Lords in its appellate capacity is a sitting of the House. The members of the House who take part in the decision move the House in turn that the appeal be allowed or dismissed, and that it be *ordered* and *adjudged* accordingly: the order and judgement are entered on the journals of the House.

The Judicial Committee advise the Queen.

A judgement of the Judicial Committee is a statement at length of the reasons⁶ which determine them in 'humbly advising' the Queen to give effect to their decision. These

¹ 50 & 51 Vict. c. 70, s. 3.

² 44 & 45 Vict. c. 3.

³ 3 & 4 Will. IV, c. 41, s. 1.

⁴ 3 & 4 Will. IV, c. 41, s. 1, and 50 & 51 Vict. c. 70, s. 4.

⁵ 3 & 4 Vict. c. 86, s. 15, and 39 & 40 Vict. c. 59, s. 14.

⁶ They are required to be so stated by 3 & 4 Will. IV, c. 41, s. 3.

reasons are not stated in the report to the Queen : this merely sets forth their conclusion and the method proposed for giving effect to it. When the report has been submitted to the Queen, and approved by her at a meeting of the Privy Council, an Order of Council is made reciting the report, and adopting it as the judgement of the Queen in Council.

Some matters remain to be noted in which these Courts differ from one another.

The judgements of the House of Lords express the individual opinions of the members of the Court : they are not therefore necessarily unanimous, and the public is made aware that there are differences of opinion in the highest Court of Appeal.

The Privy Council advises the Crown, and in so doing it is bound not to record dissentient opinion. The rule is not merely a matter of policy ; it is one of the 'Orders to be observed in Assemblies of Council' made in 1627, never altered or repealed, and re-affirmed by Order in Council in 1878. It runs thus :—

'In voting of any cause the lowest Councillor in place is to begin and speak first, and so it is to be carried by most voices, because every Councillor hath equal vote there ; and when the business is carried according to most voices, no publication is afterwards to be made by any man how the particular voices and opinions went¹.'

The question whether or no a Court of Final Appeal ought to be unanimous or appear to be so is one of policy rather than of law. It does not at the first sight seem fitting that either Court should speak with an uncertain voice. But we must regard the practice of the House of Lords as settled ;

¹ There has been much controversy as to the observance of this rule. I will be content to refer the reader to the evidence of Mr. H. Reeve before the Committee of the House of Lords on Appellate Jurisdiction, 1872, pp. 23-26, and to Lord Selborne's treatise on the Judicial Procedure of the Privy Council. Sir Walter Phillimore, in the Times, Oct. 28, 1891, at p. 3, published a list of cases in which dissent had been expressed, but as the rule has been re-affirmed by Order in Council, the controversy is merely historical.

Dissentient judgements in House of Lords.

Unanimity in Privy Council.

and to all intents the practice of the Privy Council is settled also.

The House of Lords holds itself bound by its decisions. The Privy Council, like the Supreme Court of the United States, though a court of final appeal, does not consider itself to be precluded from advising the Queen to reverse a judgment previously given¹.

The House of Lords is entitled to the assistance of the Judges of the High Court; but no one can attend the Judicial Committee unless he be a Privy Councillor, and summoned.

SECTION VI.

THE CROWN IN RELATION TO THE COURTS.

I have tried to describe the Courts through which the Crown administers justice to the subject. There are still some points to be considered before we conclude.

Admitting that all jurisdiction emanates from the Crown, we may ask whether the Queen can, at pleasure, create new, or interfere with the action of existing jurisdictions.

And again, admitting that the Queen's courts are open to all her subjects within their respective jurisdictions, we may ask whether the Crown in its own person, or that of its servants, is amenable to the rule of law and the procedure of the Courts.

§ 1. *Creation of Jurisdiction.*

Can the
Crown
create a
new court;

To the first of these questions it would seem safe to answer that the Crown cannot create a new court, nor confer a new jurisdiction on a court already existing. This is a rule laid down by great writers and embodied in judicial decisions of the highest authority². It is illustrated by the invalidity

¹ See cases mentioned by Mr. Reeve in his evidence before the Committee on Appellate Jurisdiction, p. 29, and also *Cushing v. Dupuy*, 5 App. Ca. 409, reviewing and practically overruling *Cuvillier v. Aghcyon*, 2 Knapp's P. C. 72; and see *Read v. Bishop of Lincoln* [1892] A. C. at p. 654.

² Coke, 4 Inst. 200. Comyns, Digest Tit. Prerog. D. 28. *In re Lord Bishop of Natal*, 3 Moore, P. C., N. S. 152.

of the letters patent whereby the Crown endeavoured to create ecclesiastical jurisdictions in South Africa.

As regards the United Kingdom, the matter is one of merely historical interest. The Common Law Courts grew up without statutory sanction. So too did the equitable jurisdiction of the Chancellor. The interference of the Star Chamber and Privy Council with the ordinary course of the common law needed a statute for its abolition: while the Court of Requests, which met the requirements of the poor suitor, fell as soon as its jurisdiction was questioned.

These illustrations serve to show that the limitations on the power of the Crown laid down by Coke and Comyns and adopted by Lord Westbury, were not always in force; that they are part of that gradual definition of the prerogative which I described in the first chapter of this book.

But in the British possessions the matter might be and has been of practical importance. The powers of the Crown over conquered or ceded territory do not seem to be precisely defined; but as regards settled colonies it seems clear that, unless statutory provision is otherwise made, the settlers take with them the common law of their own country, that the Crown can make provision for its administration by Order in Council or by letters patent in the form of a charter of justice¹, and cannot create a court for any other purpose.

Where a legislature exists the matter is now provided for by the Colonial Laws Act, 1865.

A question which arose some time before this Act was passed will furnish an illustration of the general rule.

A colony possessing a local legislature was in want of a court of equitable jurisdiction². The Governor, holding the seal of the colony, was regarded as Chancellor, but he declined to exercise the judicial functions of a Chancellor, to administer the King's grace by enforcing the performance of

¹ *Jephson v. Riera*, 3 Knapp, 130.

² Opinion of Sir J. Scarlett and Sir N. Tindal. Forsyth, *Cases in Constitutional Law*, 173.

trusts or protecting the property of infants. The law officers were asked whether the King had power to constitute by letters patent a Master of the Rolls for the colony with an equity jurisdiction. They advised that this could not be done: but they made two suggestions. One was that an officer should be appointed who should be Vice-Chancellor to the Governor and should use those equitable powers which the Governor declined to use. But they said, 'In order to prevent doubts on the subject, we would recommend this to be done *with the aid of Parliament or the local legislature.*' The other suggestion was that an additional judge should be added to the existing Common Law Court, who should be an equity lawyer, and that the Court so constituted should obtain, *by the authority of Parliament or of the local legislature,* so much of an equity jurisdiction as would meet the wants of the province.

Can the
Crown
interfere
with the
course of
justice ?

The interference of the Crown in the administration of justice may be said to have ceased when the Act of Settlement altered the tenure of the judges. When the judges ceased to be removable at the royal pleasure they lost a motive for regarding the royal wishes in their administration of justice, and when at the same time they were made removable on the address of both Houses, they acquired a motive for carefulness that their conduct on the Bench would bear the scrutiny of the High Court of Parliament.

Matters of
Crown
property.

There are indeed powers exercisable by the Crown through its law officers by which it has a control over judicial proceedings not available to the subject. But these are chiefly matters in which the property of the Crown is concerned; such as the right of the Crown to remove a case affecting its revenue from the Chancery to the Queen's Bench Division¹, or its right as against a trustee in Bankruptcy to property of the debtor taken under an extent between the act of bankruptcy and the appointment of the trustee².

¹ *Attorney-Gen. v. Constable*, 4 Ex. D. 172.

² *In re Bonham*, 10 Ch. D. 595.

To these matters the general rule applies that an existing prerogative of the Crown can only be taken away by express words in a statute. But beyond a statement of the principle it would not be desirable to go further into this topic.

In so far as the prerogative of mercy, exercised by reprieve, commutation of sentence or pardon constitutes an interference with the course of justice it has been dealt with elsewhere. The prerogative of mercy.

§ 2. *Liability to Jurisdiction.*

It may be stated as a general rule that no action can be brought against the sovereign in person. What then is the remedy where a subject has a cause of action legal or equitable against the Queen, or a servant of the Queen acting directly on her behalf? Remedies of the subject.

The remedy is by Petition of Right, and the nature of the remedy is this. The Queen being informed by her principal Secretary of State for the Home Department, that one of her subjects alleges a cause of action against her and has entered a petition to that effect, orders the petition to be endorsed with the *fiat* 'let right be done,' and the suit thereafter proceeds in the ordinary course as between subject and subject. The procedure under which petitions of right are lodged and the subsequent proceedings conducted is fixed by various statutes imperial¹ and colonial. The Petition of Right.

This procedure is not so important for our purposes as the extent of the remedy. Apart from statutory extension we may say in the words of Cockburn, C.J., recently adopted in the Judicial Committee, that— Limits of the remedy.

'the only cases in which the petition of right is open to the subject are, where the land, or goods, or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or if restitution cannot be given, compensation in money, or when a claim arises out of

¹ For England, 23 & 24 Vict. c. 34; for Scotland, 20 & 21 Vict. c. 44; for Ireland, 36 & 37 Vict. c. 69; and see Clode, *Petition of Right*, pp. 213-238.

a contract, as for goods supplied to the Crown or to the public service¹.

The remedy is thus held to extend to cases of property wrongfully taken or withheld, and to damages, liquidated or unliquidated², for breach of contract.

'The King
can do no
wrong.'

But it does not extend to cases of wrong alleged to be done by the Queen or her servants acting on her behalf. In *Tobin v. The Queen*³ the petitioner alleged that the captain of a Queen's ship employed in the suppression of the slave trade had taken and burnt a schooner belonging to him, under the mistaken impression that it was engaged in the slave trade. The Court, among other grounds for deciding adversely to the petitioner, laid it down that 'the maxim that the King can do no wrong' is true in the sense that he is not liable to be sued civilly or criminally for a supposed wrong; and a passage from Hale's Pleas of the Crown was cited, 'the law presumes that the King will do no wrong, neither indeed can do any wrong: and therefore if the King command an unlawful act to be done the offence of the instrument is not thereby indemnified.'

Waiver of
immunity.

This exemption from procedure by way of petition of right in cases of tort has been waived by the Crown in various colonial statutes and ordinances⁴, but in the United Kingdom the Queen acting through her servants cannot be made liable for wrong.

Liability
of Queen's
servants.

Then how far are the Queen's servants personally liable for contract broken, wrong done, or breach of duty committed?

As regards liability for contract, it may be stated shortly that a servant of the Crown who contracts on behalf of the Government cannot be made personally liable⁵.

¹ *Feather v. The Queen*, 6 B. & S. 293, cited with approval in *Windsor and Annapolis Railway Co. v. The Queen*, 11 App. Ca. p. 615.

² *Thomas v. The Queen*, L. R. 10 Q. B. 31.

³ 16 C. B., N. S. 310.

⁴ See *Farnell v. Bowman*, 12 App. Ca. 643; *Attorney-General of Straits Settlements v. Wemyss*, 13 App. Ca. 192.

⁵ *Gidley v. Lord Palmerston*, 3 B. & B. 284.

As regards wrong, no servant of the Crown may set up as defence to a wrongful act the express orders of the Crown, or orders implied by the allegation that what he did was an act of State. The lawfulness of the act complained of is determinable in a Court of Law. The case of *Entick v. Carrington*¹ contains words which though more than a hundred years old will meet every case of this character :—

‘ With respect to the argument of state necessity or a distinction that has been aimed at between state offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinction.’

State
necessity
no answer.

Two classes of state officers, military and judicial, seem to stand on an exceptional footing as regards this rule. Of the former class, and of the nature and limits of their exemption, I have spoken earlier. Their case rests on the terms of the Army Act. A remedy is there provided for such cases, and this the person who subjects himself to military law must be presumed to accept in lieu of the ordinary remedies supplied by the Courts.

Excep-
tions :
military
officer,

supra,
p. 374.

The judicial exemption is based on a larger ground of public interest.

judicial
officer.

‘ No action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice. This doctrine has been applied not only to the superior courts, but to the court of a coroner and to a court-martial, which is not a court of record. It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. How could a judge so exercise his office if he were in daily and hourly fear of an action being brought against him and of having the question submitted to a jury whether a matter

¹ 19 State Trials, 1030.

on which he had commented judicially was or was not relevant to the case before him¹.

The Lord
Lieutenant of
Ireland.

Sullivan v.
Spencer.

The general liability of officers of the Crown was dealt with in dealing with the liabilities of a colonial governor, and I can add nothing to what was said there on this subject, except to note that the Lord Lieutenant of Ireland occupies an exceptional position, and one nearer akin to royalty than that of any other colonial governor or viceroy. It has been held in a series of Irish cases, the last of which is *Sullivan v. Spencer*², that the Lord Lieutenant of Ireland is not liable in the Irish courts, during his term of office, for any act done in his politic capacity. The case is a strong one. It was an action of assault committed in the course of the suppression, by order of the Lord Lieutenant, of a public meeting. The Attorney-General for Ireland moved the Court of Queen's Bench in Dublin 'that all proceedings against the Lord Lieutenant be stayed,' and that the name of 'his excellency be struck out of the summons and plaint.' And the Court said—'What we now decide is that for an act done by the Lord Lieutenant, as Viceroy of this kingdom, in his official capacity, no action can be maintained against him in this country, where he exercises the supreme authority vested in him by the Crown, and while he bears that authority.' The case of *Sullivan v. Spencer* is not in accord with that of *Musgrave v. Pulido*³. It may be that the Lord Lieutenant of Ireland was intended to occupy this exceptional position, which is illustrated by the fact that his chief secretary, unlike the under secretaries of other ministers, is regarded as holding office under the Crown, so as to vacate his seat upon appointment, as though the Lord Lieutenant were a more direct representative of the Crown than are the governors of dependencies.

A question remains to be considered. How far can

¹ *Scott v. Stanfield*, L. R. 3 Exch. 223; and see *Anderson v. Gorrie* [1895], 1 Q. B. (C. A.), 668.

² 6 Irish Reports, C. L. 176.

³ 5 App. Ca. 102.

a servant of the Crown be required to discharge a duty laid on him towards the subject?

It would seem, as the result of numerous authorities, that proceedings, whether by *mandamus*, action for money due, or in the Chancery Division for an account, will not lie against servants of the Crown as such, unless it can be shown that Parliament by statute, or the Crown by letters patent or otherwise has cast upon them a duty to the public, as distinct from their duty to the Crown.

In *Gidley v. Lord Palmerston*¹ the plaintiff, as executor, sued the Secretary at War for money due to his testator on account of sums voted by Parliament for retired allowances of officers, of whom the testator was one. It was held that the action could not be maintained, on the ground, firstly, that Lord Palmerston was only the agent or officer of the Crown, responsible to the Crown for the due discharge of his duty, and secondly, on the ground that 'a servant of the Crown contracting on the part of the Government is not personally liable.'

*Kinloch v. The Secretary of State for India in Council*² was a case of somewhat different character. The Crown had placed a sum of money in the hands of the Secretary of State for India for the time being in trust for certain persons, of whom the plaintiff claimed to be one. He applied for an account and distribution of an undistributed portion of the sum in question. It was held that the Secretary of State was only an agent of the Crown for the purpose of the distribution, and could not be treated as a trustee in the ordinary sense of the term.

In *The Queen v. The Secretary of State for War*³ the plaintiff asked for a *mandamus* to the Secretary of State to command him to consider and determine sums alleged to be due to him under a royal warrant of which the Secretary was 'the sole administrator and interpreter.' It was held that the

Courts will not enforce duty to the Crown, but only duty to the public.

Illustration : action for money due against Secretary at War.

Suit for account against Secretary of State for India.

Mandamus asked for to Secretary of State for War.

¹ 3 Broderip and Bingham, 284 (1822).

² 7 App. Ca. 619 (1882).

³ 2 Q. B. (1891), 326.

duty cast upon the Secretary of State by the royal warrant was neither a common law nor a statutory duty, but 'a duty between him and the Crown only.' In the Court of Appeal it was held that 'the appeal must fail on the grounds, first, that a *mandamus* would not lie against the Crown, and secondly, that it will not lie against the Secretary of State, because in his capacity as such he is only responsible to the Crown, and has no legal duty imposed on him towards the subject.'

Distinctions.

The question to be determined in these cases must always be, whether the servant of the Crown has a duty cast upon him *to the public* as well as to the Crown either by statute to at common law¹. If so, he may be compelled by *mandamus* to discharge it. If not, he is responsible only to the Crown and to Parliament.

¹ See for a distinction between cases in which a public duty is or is not cast on the public servant, the cases *In re Nathan*, 12 Q. B. D. 461, and *Reg. v. The Commissioners of Income Tax*, 21 Q. B. D. 313.

APPENDIX I.

§ 1. LETTERS PATENT CONSTITUTING THE COMMISSION OF THE TREASURY.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To Our right trusty and well-beloved Councillors A. B. and C. D., and Our trusty and well-beloved E. F., G. H., and I. J., greeting. Whereas We did, by Our Letters Patent, under the Great Seal of the United Kingdom of Great Britain and Ireland, nominate, assign, and appoint Our right trusty and well-beloved Councillors M. N. and P. Q., Our trusty and well-beloved R. S., T. U., and V. W., to be Our Commissioners during Our pleasure for executing the offices of Treasurer of the Exchequer of Great Britain and Lord High Treasurer of Ireland, and to be called Commissioners of Our Treasury of Our United Kingdom of Great Britain and Ireland, as by the said Letters Patent (relation being thereunto had) may more fully and at large appear. Now know ye that We have revoked and determined, and by these presents do revoke and determine the said recited Letters Patent, and every clause, article, and thing therein contained. And further know ye that We, trusting in the wisdom and fidelities of you, the said A. B., C. D., E. F., G. H., and I. J., of Our special grace, certain knowledge, and mere motion, have nominated, assigned, and appointed, and by these presents do nominate, assign, and appoint you, the said A. B., C. D., E. F., G. H., and I. J., to be Our Commissioners during Our pleasure, for executing the offices of Treasurer of the Exchequer of Great Britain and Lord High Treasurer of Ireland, and to be called Commissioners of Our Treasury of Our United Kingdom of Great Britain and Ireland, and to do and perform all things whatsoever which might have heretofore been done and performed by the Commissioners of the Treasury in Great Britain or Ireland respectively, by whatsoever names or descriptions such Commissioners of the Treasury shall or may have been at any time known or described, save and except in so far as any powers or authorities heretofore vested in such Commissioners were altered or amended by an

Recitation
of earlier
Letters
Patent.

Revoca-
tion of the
same.

The new
Commis-
sion.

The union
of British
and Irish
Trea-
suries.

Powers of
Commis-
sion,

or any two
of them.

Act of Parliament made and passed in the fifty-sixth year of the reign of Our late Royal Grandfather, King George the Third, intituled 'An Act to unite and consolidate into one fund all the public revenues of Great Britain and Ireland, and to provide for the application thereof to the general service of the United Kingdom.' And to that end and purpose We do, by these presents, give and grant unto you, Our said Commissioners, or any two or more of you, full power and authority, immediately from henceforth, from time to time during the vacancy of the office or place of Lord High Treasurer of Our United Kingdom of Great Britain and Ireland, to confirm and approve of all those Orders and Warrants which have been already signed by the late Commissioners of Our Treasury of Our United Kingdom of Great Britain and Ireland, and which are remaining unexecuted, and which unto you shall seem reasonable and for Our service, and to cause the same to be duly executed; and also to perform and execute all and every act and acts, thing and things, whatsoever, which heretofore might or ought to have been performed by the Commissioners of Our Treasury in Great Britain or Ireland respectively, except as aforesaid, in as ample manner and as fully and effectually to all intents and purposes as the Commissioners of the Treasury in Great Britain or Ireland respectively heretofore have done or might have done by virtue of any power or authority to them respectively belonging, or of any Act or Acts of Parliament, or any law, usage, or custom in force in Great Britain or Ireland respectively. And to the end Our pleasure in the premises may be the better effected, We do hereby require and authorize Our High Chancellor of Great Britain, or Our Keeper of the Great Seal of Our United Kingdom, or Our Commissioners for the Custody of the Great Seal of Our United Kingdom; and also Our High Chancellor of Ireland, or Our Keeper of the Great Seal there, or Our Commissioners for the Custody of the Great Seal there, and all other Officers, Ministers, and persons whatsoever for the time being whom these presents shall or may in anywise concern, to give full allowance of all things to be done by you Our said Commissioners, or any two or more of you, according to Our pleasure hereinbefore declared. In witness whereof We have caused these Our Letters to be made Patent. Witness Ourself at Westminster, the day of in the year of Our Reign.

By Warrant under the Queen's Sign Manual.

[To this the Great Seal is affixed.]

§ 2. Sign Manual Warrants.

(a) *Warrant as an executive act appointing First Commissioner of Works.*

VICTORIA R.

Whereas We being graciously pleased to give and grant during Our pleasure unto Our right trusty and well-beloved A. B. the office of First Commissioner of Works and Public Buildings, constituted and appointed under and by virtue of an Act passed in the fourteenth and fifteenth years of Our reign entitled 'An Act, &c.' We do by these Our presents hereby constitute and appoint him the said A. B. to be First Commissioner of Works and Public Buildings during Our Pleasure, with all the interest, powers, titles, authorities, privileges, and duties appertaining unto and vested in the said office.

day of
Year of Our Reign.

Given at Our Court at Windsor this

in the

By Her Majesty's Command.

(Countersigned by two Lords Commissioners of the Treasury.)

(b) *Warrant as an executive act, abolishing purchase in the army.*

VICTORIA R.

Whereas by the Act passed in the Session holden in the fifth and sixth years of the reign of King Edward VI, ch. 16, intituled 'Against buying and selling of offices,' and the Act passed in the forty-ninth year of the reign of George III, ch. 126, intituled, 'An Act for the prevention of the brokerage and sale of offices,' all officers in Our Forces are prohibited from selling or bargaining for the sale of any Commission in Our Forces, and from taking or receiving any money for the exchange of any such Commission under the penalty of forfeiture of their Commissions and of being cashiered, and of divers other penalties; but the last-mentioned Act exempts from the penalties of the said Acts, purchases or sales, or exchanges of any Commissions in Our Forces for such prices as may be regulated and fixed by any regulation made or to be made by us in that behalf.

And whereas we think it expedient to put an end to all such regulations, and to all sales and purchases, and all exchanges for

money of Commissions in Our Forces, and all dealings relating to such purchases, sales, or exchanges.

Now Our Will and Pleasure is, that on and after the first day of November in this present year, all regulations made by us or any of Our Royal predecessors or any officers acting under Our authority, regulating or fixing the prices at which any Commissions in Our Forces may be purchased, sold or exchanged, or in any way authorizing the purchase or sale or exchange for money of any such Commission, shall be cancelled and determined.

Given at Our Court at Osborne, this twentieth day of July, in the thirty-fifth year of Our Reign.

By Her Majesty's Command.

EDWARD CARDWELL.

(c) *Warrant as an authority for affixing the Great Seal to the Ratification of a Treaty*¹.

VICTORIA R.

Our Will and Pleasure is, that you forthwith cause the Great Seal of Our United Kingdom of Great Britain and Ireland to be affixed to an Instrument bearing date with these Presents (a copy whereof is hereunto annexed) containing Our Ratification of a
between Us and

concluded and signed at _____ on the
day of _____ 18____, by the
Plenipotentiaries of Us and of _____
duly and respectively authorized for that purpose. And for so
doing this shall be your Warrant.

Given at Our Court at
the _____ day of _____ 189____
in the _____ year of Our Reign.

To Our Right Trusty and
Well-beloved Councillor

Our Chancellor of Great
Britain.

By Her Majesty's Command,
(Countersigned)

¹ This is an exceptional document: usually a sign manual warrant for affixing the Great Seal sets out (1) the authority, (2) the document to be sealed, (3) the purport of the document in a brief form called the docket (p. 46). The authority to seal powers connected with treaties does not pass through the Crown Office, as do most matters requiring the Great Seal.

APPENDIX II.

COMMISSIONS, &c.

§ 1. *COMMISSION passed under the Royal Sign Manual and Signet, appointing to be Governor and Commander-in-Chief of a Colony.*

Dated 14th January 1886.

VICTORIA R.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, Empress of India : To our Trusty and Well-beloved

: Greeting.

WE do by this Our Commission, under Our Sign Manual and Signet, appoint you, the said , to be, during Our pleasure, Our Governor and Commander-in-Chief in and over Our Colony, with all the powers, rights, privileges, and advantages to the said Office belonging or appertaining.

II. And we do hereby authorize, empower, and command you to exercise and perform all and singular the powers and directions contained in Our Letters Patent under the Great Seal of Our United Kingdom of Great Britain and Ireland (constituting the Office of Governor and Commander-in-Chief), bearing date at Westminster, the 13th day of January 1886, or in any other Letters Patent adding to, amending, or substituted for the same, according to such Orders and Instructions as Our Governor and Commander-in-Chief of Our Colony for the time being hath already received from Us, or as you shall hereafter receive from Us.

IV. And We do hereby command all and singular Our Officers, Ministers, and loving subjects in Our said Colony, and all others whom it may concern, to take due notice hereof, and to give their ready obedience accordingly.

Given at Our Court at Osborne House, Isle of Wight, this
day of January 18 in the year of
Our Reign.

By Her Majesty's Command.

(Countersigned by the Secretary of State for the Colonies.)

§ 2. *INSTRUCTIONS passed under the Royal Sign Manual and Signet, to the Governor and Commander-in-Chief of a Colony.*

Dated 13th January 1886.

VICTORIA R.

INSTRUCTIONS to Our Governor and Commander-in-Chief in and over Our Colony, and to Our Lieutenant-Governor or other Officer for the time being administering the Government of Our said Colony.

Given at Our Court at Osborne House, Isle of Wight, this day of January 18 in the
year of Our Reign.

Recital of
Letters
Patent.

WHEREAS by certain Letters Patent under the Great Seal of Our United Kingdom of Great Britain and Ireland, bearing even date herewith, We have constituted, ordered, and declared that there shall be a Governor and Commander-in-Chief (therein and hereinafter called the Governor) in and over Our Colony as therein described (therein and hereinafter called the Colony): And whereas We have thereby authorized and commanded the Governor to do and execute all things that belong to his said office, according to the tenor of Our said Letters Patent and of such Commission as may be issued to him under Our Sign Manual and Signet, and according to such Instructions as may from time to time be given to him under Our Sign Manual and Signet, or by Our Order in Our Privy Council or through one of Our Principal Secretaries of State, and to such laws as are now or shall hereafter be in force in the Colony: And whereas We are minded to issue these Our Instructions under Our Sign Manual and Signet for the guidance of the Governor, Lieutenant-Governor, or other Officer administering the Government of the Colony: Now, therefore, We do hereby revoke Our Instructions under Our Sign Manual and Signet bearing date the
of

Revoca-
tion of
earlier
instruc-
tions.

relating to Our Colony as heretofore constituted, and We do hereby direct and enjoin and declare Our will and pleasure, as follows:—

[I-II. PROVISIONS FOR ADMINISTERING OATHS OF ALLEGIANCE, AND FOR
ABSENCE OF GOVERNOR.]

Composi-
tion of
Executive
Council.

IV. The Executive Council of the Colony shall consist of the following Members, that is to say: the Lieutenant-Governor of

the Colony (if any), the Senior Military Officer for the time being in command of Our regular troops within the Colony, the Officers lawfully discharging the functions of Colonial Secretary, of Queen's Advocate, and of Treasurer of the Colony, and such other persons as We may from time to time appoint by any Instruction or Warrant under Our Sign Manual and Signet.

Whenever upon any special occasion the Governor desires to obtain the advice of any person within the Colony touching Our affairs therein, he may, by an Instrument under the Public Seal of the Colony, summon for such special occasion any such person as an Extraordinary Member of the Executive Council.

IV-XIII. PROCEDURE OF EXECUTIVE COUNCIL.

XIII. The Legislative Council of the Colony shall consist of the Governor, the Lieutenant-Governor (if any), the Chief Justice or acting Chief Justice, the Senior Military Officer for the time being in command of Our Regular Troops within the Colony, the persons from time to time lawfully discharging the functions of Colonial Secretary, Queen's Advocate, and Treasurer of the Colony, and such other persons holding offices in the Colony as We may from time to time appoint by any Instructions or Warrants, under Our Sign Manual and Signet, and all such persons shall be styled Official Members of the Legislative Council; and further of such persons, not holding offices in the Colony, as We may from time to time appoint by any Instructions or Warrants under Our Sign Manual and Signet, and all such persons shall be styled Unofficial Members of the Legislative Council.

XIII-XXIII. PROCEDURE OF LEGISLATIVE COUNCIL.

XXIII. The Governor shall not, except in the cases hereunder mentioned, assent in Our name to any Ordinance of any of the following classes:—

1. Any Ordinance for the divorce of persons joined together in holy matrimony.
2. Any Ordinance whereby any grant of land or money, or other donation or gratuity, may be made to himself.
3. Any Ordinance whereby any increase or diminution may be made in the number, salary, or allowances of the public officers.
4. Any Ordinance affecting the Currency of the Colony or relating to the issue of Bank notes.
5. Any Ordinance establishing any Banking Association, or

Ordinances to which the Governor may not assent without reserve.

amending or altering the constitution, powers, or privileges of any Banking Association.

6. Any Ordinance imposing differential duties.

7. Any Ordinance the provisions of which shall appear inconsistent with obligations imposed upon Us by treaty.

8. Any Ordinance interfering with the discipline or control of Our forces by land or sea.

9. Any Ordinance of an extraordinary nature and importance, whereby Our prerogative or the rights and property of Our subjects not residing in the Colony, or the trade and shipping of Our United Kingdom and its dependencies, may be prejudiced.

10. Any Ordinance whereby persons not of European birth or descent may be subjected or made liable to any disabilities or restrictions to which persons of European birth or descent are not also subjected or made liable.

11. Any Ordinance containing provisions to which Our assent has been once refused, or which have been disallowed by Us.

Unless such Ordinance shall contain a clause suspending the operation of such Ordinance until the signification of Our pleasure thereupon, or unless the Governor shall have satisfied himself that an urgent necessity exists requiring that such Ordinance be brought into immediate operation, in which case he is authorized to assent in Our name to such Ordinance, unless the same shall be repugnant to the law of England, or inconsistent with any obligations imposed on Us by treaty. But he is to transmit to Us, by the earliest opportunity, the Ordinance so assented to, together with his reasons for assenting thereto.

[The remainder of the instructions relate to details as to the Government of the Colony.] V.R.¹

§ 3. *Form of Commission on First Appointment to Permanent Rank in the Army.*

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, &c. To Our trusty and well-beloved² greeting:

We, reposing especial trust and confidence in your loyalty, courage, and good conduct, do by these presents constitute and

¹ Instructions are signed at the head and initialed at the foot by the Queen, and are sealed with the Signet: but are not countersigned by the Secretary of State. This makes them an exceptional document.

² Here insert the name of the qualified candidate.

appoint you to be an Officer in Our¹ [Land^a, Royal Marine^b, Militia^c, Yeomanry^d, or Volunteer^e Forces] from the² day of 18 . You are therefore carefully and diligently to discharge your duty as such in the rank of or in such higher rank as We may from time to time hereafter be pleased to promote or appoint you to, of which a notification will be made in the London Gazette, and you are at all times to exercise and well discipline in arms both the inferior Officers and Men serving under you, and use your best endeavours to keep them in good order and discipline. And We do hereby command them to obey you as their superior Officer, and you are to observe and follow such orders and directions as from time to time you shall receive from Us or any your superior Officer, according to the rules and discipline of war, in pursuance of the trust hereby reposed in you.

Given at Our Court at the day of 18 , in the Year of Our Reign.

By Her Majesty's Command³.

§ 4. *Form of Commission for a Secretary of Embassy or Legation.*

Draft.

[Name.]

Commission, as Secretary to Her Majesty's Embassy
Legation at

(The large
Signet) VICTORIA R.

VICTORIA, by the Grace of God, Queen of the United Kingdom, of Great Britain and Ireland, Defender of the Faith, &c., &c., &c., To all and singular to whom these presents shall come, greeting, Whereas it appears to Us expedient to nominate some person of approved industry, fidelity, and knowledge to perform the functions

of secretary to our Embassy
Legation to

Know ye therefore, that We have constituted and appointed, as We do by these presents constitute and appoint, Our trusty and well-beloved [Name] to be secretary to that

¹ a, b, c, d, e, to be inserted, as the case may be.

² Date to be inserted from the submission paper signed by Her Majesty.

³ For other forms of military commission see *Manual of Military Law*, edited by G. A. R. Fitz-Gerald, and ed., 1887, p. 501.

Embassy
Legation; giving and granting to him, in that character, all power and authority to do and execute all necessary writings, memorials, and instruments, as also to assist Our *Ambassador Extraordinary and Plenipotentiary* to in all things which may belong to the duties of secretary to the aforesaid Embassy
Legation.

And we therefore request and his Ministers, and all those whom it may concern, to receive and acknowledge Our said trusty and well-beloved as secretary to Our said Embassy
Legation and freely to communicate with him upon all and singular the things that may appertain to the affairs of the said Embassy
Legation.

Given at Our Court at the day of in the year of Our Lord One thousand eight hundred and in the year of Our Reign.

By Her Majesty's Command.
(Countersigned by the Secretary of State.)

§ 5. *Form of a Credential Letter addressed to a Sovereign*¹.

SIR, MY BROTHER,

Being desirous to maintain without interruption the relations of friendship and good understanding which happily subsist between the two Crowns, I have made choice of [Names and Titles] to reside at the Court of Your *Imperial* Majesty in the character of my *Ambassador Extraordinary and Plenipotentiary*. The long experience which I have had of

talents and zeal for My service assures me that the selection which I have made will be perfectly agreeable to your *Imperial* Majesty, and that he will discharge the important duties of his *Embassy* in such a manner as to prove himself worthy of this new mark of my confidence, and to merit Your *Imperial* Majesty's approbation and esteem. I therefore request that you will give entire credence to all that shall communicate to you in My name, more especially when he shall assure Your

¹ House of Commons Papers, 1861, vol vi, Report of Select Committee on the Diplomatic Service, Appendix iii, p. 500.

Imperial Majesty of my invariable esteem and regard, and shall renew to you the expression of those sentiments of sincere attachment and highest consideration with which I am,

Sir, My Brother,

Your *Imperial* Majesty's good Sister,

VICTORIA R.

[Place.]

[Date.]

To My good Brother the *Emperor* of []

APPENDIX III.

ISSUE OF PUBLIC MONEY.

ROYAL ORDER FOR PUBLIC SUPPLY SERVICES.

(For Her Majesty's Royal Sign Manual.)

Supply Services.

VICTORIA R.

WHEREAS the several sums mentioned in the Schedule hereunto annexed have been granted to Us (by Act, or by Resolution of the House of Commons, *as the case may be*) to defray the expenses of the Public Supply Services therein specified, which will come in course of payment in the year ending the 31st March, 18—; Our Will and Pleasure is, that you do, from time to time, authorize the Governor and Company of the Bank of England, or the Governor and Company of the Bank of Ireland, to issue or transfer from the Account of Our Exchequer at the said Banks to the Accounts of the persons charged with the payment of the said Services, such sums as may be required, from time to time, for the payment of the same, not exceeding the amounts respectively stated in the said annexed Schedule.

Provided that such issues or transfers shall be made out of the Credits granted or to be granted to you, from time to time, on the Account of Our Exchequer at the said Banks, by the Comptroller and Auditor-General, under the authority of the Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39, s. 15), and shall not exceed in the whole the amount of the Credits so granted

out of the Ways and Means appropriated by Parliament to the Service of the said year.

Given at Our Court at this day of 18

By Her Majesty's Command,

*To be countersigned by two }
Lords of the Treasury.*

To the Commissioners of Our Treasury.

SCHEDULE.

Supply Service for which valued or granted.	Amount.		
	£	s.	d.

TREASURY REQUISITION AUTHORIZING CREDITS FOR SUPPLY SERVICES.

Supply Services.

Year 18 .

By virtue of the Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39, s. 15): We authorize and require you to grant to the Lords Commissioners of Her Majesty's Treasury for the time being, on account of the Ways and Means granted for the service of the year ending 31st March, 18—, Credits on Account of Her Majesty's Exchequer at the Bank of England and Bank of Ireland, or on the growing Balances thereof, the following sums; viz:—

At the Bank of England . . . £

At the Bank of Ireland . . . £

Treasury Chambers, Whitehall, }
18

*To be signed by two Lords }
of the Treasury.*

To the Comptroller and Auditor-General.

GRANT OF CREDIT BY THE COMPTROLLER AND AUDITOR-
GENERAL FOR SUPPLY SERVICES.

Credit for Supply Services.

Year 18 .

By virtue of the Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39, s. 15), and of a Requisition from the Lords Commissioners of Her Majesty's Treasury, authorizing the same: I hereby grant a Credit to the Lords Commissioners of Her Majesty's Treasury for the time being, on Account of Her Majesty's Exchequer at the Bank of , or on the growing Balance thereof, to the Amount of
on account of the Ways and Means granted for the Service of the year ending 31st March, 18 .

Exchequer & Audit Department	}	<i>Comptroller & Auditor-General.</i>
18 .		
To the Governor & Company of	}	
the Bank of .		

TREASURY ORDERS FOR ISSUES FROM THE EXCHEQUER
ACCOUNT FOR SUPPLY SERVICES.

Supply Services.

Year 18 .

Treasury, Whitehall,
18 .

GENTLEMEN,

Under the authority of the Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39, s. 15), and of the Credit granted to the Lords Commissioners of Her Majesty's Treasury, by the Comptroller and Auditor-General, on the Account of Her Majesty's Exchequer at the Bank of , under the provisions of the said Act: I am commanded by the Lords Commissioners of Her Majesty's Treasury to request that you will transfer the following sums, on the instant, from the

transfer the following sums, on the instant, from the said Account to the 'Supply Account' of [Her Majesty's Paymaster-General¹] in your books, on account of the charge of the Consolidated Fund in [Great Britain²] for the above-mentioned Quarter.

Service.	Amount.		
	£	s.	d.

APPENDIX IV.

OATHS.

For the *Coronation Oath* see p. 68.

For the *Privy Councillor's Oath* see p. 142.

The Oath of Allegiance.

I do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her Heirs and Successors according to Law.

So help me God.

The Official Oath.

I do swear that I will well and truly serve Her Majesty Queen Victoria in the Office of .

So help me God.

The following are the persons who are required to take this oath by 31 & 32 Vict. c. 72.

ENGLAND.

First Lord of the Treasury.
Chancellor of the Exchequer.
Lord Chancellor.
President of the Council.
Lord Privy Seal.

¹ [Or of such other Principal Accountants as the case may require.]

² [Or Ireland.]

Secretaries of State.
 First Lord of the Admiralty.
 Chief Commissioner of Works and Public Buildings.
 President of the Board of Trade.
 Lord Steward.
 Lord Chamberlain.
 Earl Marshal.
 Master of the Horse.
 Commander-in-Chief.
 Chancellor of the Duchy of Lancaster.
 Paymaster-General.
 Postmaster-General.
 Secretary for Scotland by 48 & 49 Vict. c. 61, s. 3.
 The President of the Board of Agriculture by 52 & 53 Vict.
 c. 30, s. 8.

[The President of the Local Government Board must, it is presumed, be required to take the Oath, as the President of the Poor Law Board was by the Act of 1868, but it is not so specified in the Act which constitutes his office.]

SCOTLAND.

The Lord Keeper of the Great Seal.
 The Lord Keeper of the Privy Seal.
 The Lord Clerk Register.
 The Lord Justice Clerk.

IRELAND.

The Lord Lieutenant.
 The Lord Chancellor.
 The Commander of the Forces.
 The Chief Secretary for Ireland.

For England the oath is tendered by the Clerk of the Council and taken in the Queen's presence in Council or otherwise as she may direct.

For Scotland the oath is tendered by the Lord President of the Court of Session at a sitting of the Court.

For Ireland the oath is tendered by a Clerk of the Council and taken at a meeting of the Privy Council in Ireland.

The Judicial Oath.

I do swear that I will well and truly serve our Sovereign Lady Queen Victoria in the Office of _____ and I will do right to all manner of people after the laws and usages of this realm without fear or favour, affection or ill-will.

This oath is required of the Lord Chancellor and all the judges of the Supreme Court of Judicature, in England and Ireland, by the Recorders of London and Dublin. By the Lord Justice General and President of the Court of Session, the Lord Justice Clerk, the Judges of the Court of Session, and the Sheriffs in Scotland, and by Justices of the Peace for Counties and Boroughs in the three kingdoms.

In all places and for all purposes in which an oath is required by law an affirmation may now be made under the provisions of 51 & 52 Vict. c. 46.



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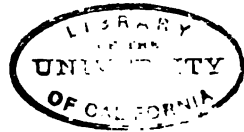
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